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THE

KENTUCKY

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THE
KENTUCKY LAW REPORTER.

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JULY, 1881.

No. 1

In assuming editorial charge of "The Kentucky Law Reporter" a word is due from the editors to the profession. An apology for the publication of a legal journal in the State of Kentucky is entirely unnecessary, and we entertain no fears of an unkindly reception. The bar has long felt the need of such a publication, and will, we are persuaded, lend their assistance and encouragement to its support and continuation. Necessarily the decisions embraced in the volumes of the Kentucky reports are published many months after their rendition, and the profession, except through publications at irregular intervals in certain newspapers, is, in the meantime, left almost entirely ignorant of the latest adjudications, and continues wholly unacquainted with many questions which have been decided in those opinions of the appellate court which have not been officially reported. It is with the hope and purpose of supplying this apparently indispensable information that we have undertaken our editorial duties, determined to do our work thoroughly and accurately, publishing all such decisions as are to be reported in full, such others as may seem to be more than ordinarily important, and also complete and careful abstracts of all unpublished opinions.

The pages of The Reporter will be open to members of the bar who may desire to make public their opinions in regard to disputed questions of law or practice in the courts, or to write practical articles upon legal matters of interest and importance. When the decisions of the Court of Appeals seem to be

erroneous, we shall not abstain from respectful scrutiny and criticism, but we will not afford assistance in giving expression to the dissatisfaction of disappointed lawyers or litigants.

Such improvements as may be suggested, from time to time, will be adopted, and it will be the constant endeavor of the editors to give useful and acceptable information to the bench and bar of the State, and to the profession generally.

We are assured by the publisher that he will permanently continue the publication of *The Kentucky Law Reporter*, and that he will make every needed improvement in its mechanical execution.

Relying upon the sympathy and support of the members of the profession, we shall endeavor to deserve their continued confidence and favor.

W. P. D. BUSH,
FINLAY F. BUSH.

OPINION OF THE JUDGES OF THE COURT OF APPEALS ON THE SUBJECT OF THE POWER OF THE GOVERNOR TO FILL VACANCIES BY APPOINTMENT.

The governor has no power to fill a vacancy in the office of a judge of the Court of Appeals unless the unexpired term shall be less than one year, in which case he may fill such vacancy by appointment.

Opinion of the court by Judge Hargis.

We have been requested by the chief executive of the Commonwealth to expound the Constitution relative to his power to fill temporarily by appointment a vacancy in the Court of Appeals, where the unexpired term shall be greater than one year.

In construing the sections of the present State Constitution which confer upon the governor the general power to fill vacancies, and to make appointments under specified contingencies, it must be borne in mind that the Constitution is to be construed as a frame of government, and its interpretations result, if possible, in a consistent whole. And the pervading principles of the Constitution which it superseded, pertaining to the nature and extent of the power of executive appointment, should be looked into and compared with the theory and

spirit of the present instrument on that subject, as the dissimilitude will shed light upon its meaning, and lead to a better understanding of the intention of its framers.

The Constitution of 1799 invested the governor with the power to fill judicial offices by appointment; but the present Constitution abrogated that system, and substituted therefor an elective judiciary.

It is said in 3 Metcalfe, 211: "To curtail the power of appointment to office by the executive, and to extend the election principle, was one of the leading objects of the authors of the new Constitution. This purpose was not more distinctly manifested in the expressions of public sentiment, which led to the call of the convention, than it has been in the provisions of the instrument itself. Almost all judicial and ministerial offices, as well as many of the executive offices, had been previously filled by appointment.

"The great object of the change in the system was to refer to the people the choice of their officers, of all grades and classes, whether State, district, county, city or town offices."

The general elective principle manifested by this unsparing change in the organic law is significant, and supports with great force the denial of the power to fill vacancies by executive appointment unless it be, in every case where it is claimed, shown to exist by some specific clause of the Constitution, or through laws enacted in pursuance of or not inconsistent with its provisions, or where vacancies are not provided for either by the Constitution or legislative enactment.

It is true whenever a question is addressed exclusively to the executive judgment neither of the other departments of the government can inhibit or control executive action upon such question, and this principle flows from the triune character of our government, by which its sovereignty is confided to distinct co-ordinate departments, whose officers shall exercise none but the powers of the department to which they belong, unless expressly directed or permitted to do so by the Constitution.

This is said to be "perhaps the most conservative provision in our organic law."

And section 9 of article 3 confers upon the governor, who is the head of the executive department, the general power to fill vacancies in this language:

"He shall have the power to fill vacancies that may occur by granting commissions, which shall expire when such vacancies shall have been filled according to the provisions of this Constitution."

The language of this section leaves but little room for interpretation.

Its literal meaning seems to be self-explaining, and would doubtless authorize appointments by the governor to fill vacancies temporarily in the absence of other provisions of the Constitution, or laws passed in pursuance thereof, declaring that vacancies shall be filled in a different manner.

But it is a sound rule of construction that the whole instrument should be examined with a view of arriving at the true intention of each part.

And when we look at the Constitution upon the subject of vacancies, it is clear that the power to fill vacancies temporarily under said section, which is not self-executing, was not conferred upon the governor, to be exercised by him upon his knowledge of the existence of a vacancy, without further constitutional or statutory authority.

And it will not do to say that unless the power to fill vacancies temporarily belongs to the governor in the literal and isolated sense of the section quoted, offices will be without incumbents for a time, and the framers of the Constitution never intended such a result, because, in the very nature of things, such a result, to a greater or less extent, is bound to follow vacancies in any office under any Constitution devised by man.

And the framers of our Constitution did not rely upon this section alone to supply vacancies temporarily, as is clearly shown by other sections which either provide a different mode in filling them, or plainly negative the necessity therefor.

Section 7 of article 6 provides that "vacancies in offices under this article shall be filled until the next regular election in such manner as the general assembly may provide."

That article concerns "executive and ministerial offices for counties and districts," and designates, of those classes, the office of Commonwealth's attorney, circuit court clerk, county court clerk, county attorney, sheriff, surveyor, coroner, jailer, assessor and constable, offices for towns and cities, and such county and district ministerial and executive offices as shall be created by the general assembly.

It is plain that the general assembly, and not the governor, has the power to fill vacancies temporarily in all of those offices "until the next regular election."

By section 85, article 4, the general assembly is directed to provide the mode of filling vacancies in the office of county judge and justice of the peace.

It is also provided in section 13, article 4, that when a vacancy shall occur, from any cause, in the office of clerk of the Court of Appeals, the judges of that court shall have power to appoint a clerk pro tem. to perform the duties of the clerk until such vacancy shall be filled.

Section 26, article 8, provides for filling vacancies in State offices in this language: "When a vacancy shall happen in the office of attorney-general, auditor of public accounts, treasurer, register of the land office, president of the board of internal improvement, or superintendent of public instruction, the governor, in the recess of the State, "shall have power to fill the vacancy by granting commissions which shall expire at the end of the next session, and shall fill the vacancy for the balance of the time by and with the advice and consent of the senate."

Thus by this section power to fill the vacancy temporarily in those offices, and until the end of the next session of the senate, is expressly conferred upon the governor; yet if he had the power under section 9 of article 8 to fill all vacancies until they shall have been filled according to the provisions of the Constitution, and its framers had so understood and intended the section, it was wholly unnecessary to confer upon him the power to fill the vacancies in those offices until they shall have been filled by and with the advice and consent of the senate; and no provision of a solemn written Constitution should be held to be purposeless, but each should be given effect, and the whole rendered uniform if practicable.

That the framers of the Constitution believed they had invested the governor with general power to fill vacancies temporarily, with the limitation we have suggested, is strongly evidenced by the fact that they either delegated the power to the general assembly or expressly provided in the Constitution itself the manner of filling of vacancies temporarily in all of the offices created by the Constitution except lieutenant-governor, member of the general assembly, circuit judge and appellate judge.

As to these the necessity of filling the vacancies temporarily did not exist, nor did the vacancies demand more expeditious means of filling them than were adopted by the Constitution.

Should a vacancy occur in the office of lieutenant-governor during the recess of the senate there could be no great necessity for filling the vacancy until the senate, over which he presides by virtue of his office, should assemble unless he were acting, or should be called upon to act, as governor, and in that event the Constitution (section 20, article 3) makes it "the duty of the secretary of state for the time being to convene the senate for the purpose of choosing a speaker." And this construction avoids the possibility of the governor appointing his own successor.

Section 31, article 2, provides that "the general assembly shall regulate by law, by whom, and in what manner writs of election shall be issued to fill vacancies which may happen in either branch thereof."

And no one certainly would contend that the Constitution conferred upon the governor the power to fill vacancies temporarily in the office of senator or representative, or that it would ever become necessary to do so to constitute a quorum.

Before considering the sections of the Constitution, which are in substance the same, relative to the mode of filling vacancies in the office of appellate or circuit judge, we will call attention to the contemporaneous and subsequent practical construction placed upon the provisions of the Constitution above mentioned by the legislative department in putting them into operation.

They furnish a most reliable guide in the construction of the extent of the general power conferred upon the governor to fill vacancies temporarily by section 9 of article 3.

It is provided by section 7, article 6, chapter 88, General Statutes, title "Elections," that a vacancy in the office of Commonwealth's attorney or circuit court clerk shall be temporarily filled by the circuit judge until the next succeeding election.

Section 5, *ibid*, directs that a vacancy in the office of sheriff, coroner, surveyor, county court clerk, county attorney, jailer, constable or assessor shall be temporarily filled by the county court until the next succeeding August election.

Section 8 of the same article requires that a vacancy in the office of county judge shall be filled by the justices of the peace of the county until the next August election.

And even as to vacancies in the office of justice of the peace the legislature, in providing therefor, considered it necessary to the exercise of the power by the governor to expressly invest him with authority to fill them temporarily until the next succeeding May or August election, and the executive department has uniformly complied with this provision of the law, thereby showing its recognition of the authority of the legislature to enact it.

While "contemporary construction can never abrogate the text, never fritter away its obvious sense, never narrow down its true limitations, and never enlarge its natural boundaries," the practical exposition of section 9, article 3 of the Constitution, which the legislature has given by the many provisions for filling vacancies temporarily, sustains the construction of that section we have indicated with a plausibility and strength not easily destroyed.

But we are warned that legislative construction is neutralized by executive interpretation.

The single instance, not to be dignified into a precedent, of the *ad interim* appointment of the late Judge Sampson to fill a vacancy in the Court of Appeals, took place near the close of a power-assuming war, which carried from the military into the exercise of civil authority the example of force and a neglect or disregard of written Constitutions.

That instance, without another of like character to support it, and in conflict with the practice of subsequent governors who expressly refused to exercise the power, although vacancies of the same kind and of equal necessity have occurred, does not furnish such a precedent as should command our implicit confidence in its correctness, which should always exist in a constitutional precedent.

Section 7, article 4, reads: "If a vacancy shall occur in said Court (of Appeals) from any cause, the governor shall issue a writ of election to the proper district to fill such vacancy for the residue of the term: Provided, That if the unexpired term be less than one year the governor shall appoint a judge to fill such vacancy."

In construing this section two well-established canons of constitutional construction should be applied: One, that effect must be given to a particular intent plainly expressed in one part of the Constitution, though apparently opposed to a general intent deduced from other parts, or, as Judge Story expresses it, "the specification of particulars is the exclusion of generals;" the other, where the whole of a subject is so provided for by a clause of the Constitution as to leave no doubt of the manner of its enforcement or the agency designated for that purpose, such subject is placed beyond legislative power or executive control. (*Lowe v. Commonwealth*, 3 Met., —; *Page v. Hardin*, 8 Ben Mon., —.)

It will be seen that the governor is commanded to issue a writ of election to fill the vacancy; that it must go to the district wherein it occurs, and the writ of election must be to fill such vacancy for the residue of the term.

And there is no qualification of these plain expressions, except the unexpired term be less than one year, then, and then only, the governor shall appoint a judge to fill such vacancy.

Whether this provision, while it is being complied with by the governor and electors of the proper district, will leave any part of the residue of the term without an incumbent, does not destroy the particular intent plainly expressed by the simple language used, and authorize an interpretation of the first clause of the section that will permit some other mode of fill-

ing, the vacancy for the residue of the term than by writ of election issued by the governor, and the votes of the free electors of the district wherein it occurs.

And this conclusion is sustained, not only by the elective system inaugurated by the Constitution, legislative and executive construction, but by the terms of section 4, article 4, which provide that any three of the judges of the Court of Appeals may constitute a court for the transaction of business.

And although a vacancy may occur a court still exists, and the absolute necessity for a pro tem. judge is thereby avoided.

It may be suggested, however, that two or more vacancies in the court might happen at the same time, and that then the necessity would arise for the action of the governor under the general power to fill vacancies ad interim.

But we ask why invest the governor with the power to fill vacancies for the time being rather than the people? The answer is that he can do it more readily than them. Admit that to be true, yet if the framers of the Constitution had intended section 9 of article 3 to apply for that reason to a vacancy in the Court of Appeals, they certainly would have specified the time within which the governor should act, and not left it solely to his discretion, when by a not unreasonable exercise thereof he might deliberate more than six weeks in selecting an incumbent, and when the people can and have acted in that space of time. Besides, the inability to prove a necessity for the governor exercising the appointing power, not capable of being equally met by the people through an election, it is shown by the Constitution that its framers never intended to place the power to constitute a Court of Appeals by filling vacancies in any other hands than those of the people. They said there shall be no court with power to transact business with less than three judges. And in all cases that can possibly arise, where it might be necessary to the existence of a constitutional court to fill vacancies, the people, and not the governor, have been expressly invested with the power under a writ of election to fill them. Under the arrangement of the Constitution there can not be at the same time less than one year unexpired of the term of office of two judges

should they die or resign at the same instant, or even within one year of each other.

Should the office of any one of them become vacant within one year of the expiration of his term the other judges would each have more than one year to serve; and under the provision of the Constitution, "that if the unexpired term be less than one year the governor shall appoint," it is clear he was not empowered to fill more than one vacancy in the Court of Appeals at the same time, although two might occur, because his power to appoint is limited to vacancies of less than one year's time.

This exclusion of his power to fill vacancies of more than one year's duration by the express language of the Constitution and the significant organization of the Court of Appeals, gives great force to the thought running through the Constitution, that the judiciary shall not be appointed by the executive unless authority to do so is given with particularity.

The legislature, adopting the interpretation of section 7, article 4, we have placed upon it, made an exception to the law fixing the day to be appointed generally by writ or proclamation for holding an election to fill vacancies, and provided the brief space of six weeks, the shortest reasonable time for holding an election to fill a vacancy in the office of judge of the Court of Appeals, while it fixed a much longer time within which to fill vacancies in less important offices by smaller constituencies occupying a much more limited territory.

If the construction placed on section 7, article 4, by those favoring the exercise of the power to appoint should be adopted, it would result that the residue of the term, however long the period, could be filled by the appointment of the governor, as the Constitution does not provide when the writ of election shall issue.

The governor might be satisfied with the person appointed, and decline to issue the writ; and in the absence of some legislative enactment designating the period within which such a vacancy shall be filled the governor could withhold or issue the writ of election at his pleasure; or he might deny the power of the legislature to direct him when to issue the writ of elec-

tion on the ground that the Constitution provides the state of case in which he shall issue the writ, and having the power to issue it, claim that his power as to the time and manner of doing so is implied, and beyond legislative regulation.

Construe the clause of section 7, article 4, which directs the governor to issue a writ of election to fill the residue of the term, as if there had been no legislation in reference to it, and it is evident the authors of the Constitution intended to clothe the executive with the power to appoint only when there is less than one year of the term to expire.

The power is expressly limited by the last clause of the section, and the mode of filling the vacancy clearly pointed out in the first.

If it was the purpose to provide for the temporary appointment of a judge to serve until an election should be held, the framers of the Constitution would have certainly said so, as they did in other sections, by which they provided for the temporary appointment of State officers, clerk of the Court of Appeals, and all the executive and ministerial officers for counties and districts.

And, in conclusion, we say: "If the existence or nonexistence of the power in question is, or ought to be, determined by the language of section 9, article 3, and of section 7, article 4, without the aids from the various sources to which we have gone, and were they in conflict with each other, the latter must control, as it specifically provides the manner of its enforcement, by whom it shall be done, and regulates the whole subject-matter, and is, equally with the former, the best of the organic law.

And no department of the government, whether legislative, executive or judicial, has the power to abrogate the meaning of its terms or establish other modes than those embraced within its fixed limits.

With these expressions of our views of the subject upon which your excellency has sought our advice, we inclose official notice of the death of our stainless associate, Chief Justice Martin H. Cofer, who was dear to us, and invaluable to the State.

SHAWHAN, &c. v. ZINN, &c.

(Filed March 5, 1881.)

Corporations—Rights of stockholders—A stockholder has no right to sue to enforce a corporate cause of action unless the officers of the corporation refuse to sue to assert the cause of action alleged by him, and in order to show or manifest his right to sue in such a case the stockholder must allege that the officers of the corporation refuse to sue to assert that cause of action, and he must also make the corporation a party to his suit.

In this case the stockholder's petition was properly dismissed absolutely by the lower court because he did not allege that the officers of the corporation had refused to sue, and also because he did not make the corporation a party defendant to his suit.

Opinion of the court by Judge Pryor.

An action was pending in the Kenton Chancery Court between the Covington & Lexington Railway Co., as plaintiffs, and Bowler's heirs and others, defendants, involving the right of Bowler's heirs to hold the road as purchasers at a decretal sale subjecting the road to the payment of a large sum of money, secured by mortgage, and sold at the instance of the mortgagees under a petition in equity filed in the Fayette Circuit Court. The right of the parties was finally determined on an appeal to this court, in an opinion holding that the purchase inured to the benefit of the Covington & Lexington Railroad Co., and a mandate issued directing certain proceedings to be had in the court below. After this opinion was delivered, on a petition for a rehearing filed in which it appeared that the heirs of Bowler were not all before the court, the mandate or opinion was modified and the heirs of Bowler were permitted to make defense, and if no proper defense was interposed the judgment directed to be entered as required by the original opinion.

The parties who purchased under the sale of the Fayette court had organized a new corporation known as the Kentucky Central Railroad Co.

After the return of the cause from this court the president, directors, etc., of the Covington & Lexington Railroad Co. (the old corporation) entered into a compromise with the new corporation, or the purchasers of the road, by which the action for its recovery by the old corporation was dismissed and the

stock transferred by the agreement to the new corporation, thereby leaving the purchasers at the decretal sale the owners of the road.

Whether the president and directors, or a majority of them, were authorized to make the agreement at a meeting of the stockholders does not appear, and whether such power could have been conferred is not material to inquire. It is evident, however, that where the franchise has already been sold the power of the president and directors to compromise with the purchasers in a controversy involving the validity of the sale would not be controlled by the well-established rule that the directors of a corporation have no power to destroy its corporate existence.

The appellant in the present case alleges that he is a stockholder, and that the board, or a majority of them, combining with the defendants in the original action for the purpose of defrauding the stockholders, entered into the compromise by which the action for the recovery of the road was dismissed and all the rights and franchises transferred to the new corporation, thereby destroying not only the existence of the old corporation, but rendering the stock of the appellant valueless. He asks that the action dismissed by the directors be reinstated on the docket, and that he be permitted to prosecute the action, and that the compromise agreement be disregarded. It is plain that the president and directors of the old company, having the right to institute the action, had the power to dismiss it, and certainly one out of many stockholders may not, and in the name of or for the corporation, will not be permitted to prosecute the action in his own name against the will and consent of the directors. A stockholder may sue for the corporation or his associate stockholders when the rights of the corporation are involved and the directors decline to sue, or refuse to permit the stockholders to prosecute the action in the name of the corporation. Such facts must be alleged and the corporation must be a party plaintiff or defendant, and this is indispensable because, as said in the case of *Davenport v. Davis*, 14 Wallace, —, "the relief is asked in

behalf of the corporation and not the individual stockholder." There is no allegation that the directors decline to reinstate the case on the docket, or that any demand was ever made of them, or either of them, by the stockholder bringing this action or any parties in interest to continue its prosecution; nor is the corporation, the Covington and Lexington Railroad Co., a party to the action, and its prosecution, therefore, by the stockholder would be no bar to a subsequent action by the corporation.

This is not merely a defect of parties (the failure to bring the corporation before the court) to be taken advantage of by special demurrer, but the omission to make the corporation either a plaintiff or defendant leaves the stockholder without a cause of action; in other words, the party entitled to the relief is not before the court. The stock of the stockholder in the old corporation, or his rights under it, can not be affected if the directors have no power to make the compromise, but this is a different question from the relief sought here, viz: That the stockholder may institute and prosecute the action in his own name. We have the stockholder asserting this right, and president and directors in court asking its dismissal, and the court very properly sustained the demurrer.

"It is admitted that such a suit would be defective, and that in every case where the question, whether of *ultra vires* or of fraud, is one which concerns the corporation itself, the corporation must be a party, either as plaintiff or defendant. A decision in the absence of the corporation would be a decision affecting the rights and liabilities of an individual not before, and not heard by, the court." (Green Brice's *Ultra Vires*, page 571.)

If this stockholder can institute an action in his own name and for his own benefit every other stockholder may bring a like action, and, therefore, the necessity of bringing the party entitled to the relief before the court, and if no such party appears a demurrer should be sustained.

It was not necessary or proper for the court below to dismiss the action without prejudice, as it can not affect the rights of any of the parties, nor was it proper for the court to require the appellant to bring the corporation before the court—this was the appellant's duty, as in the absence of the corporation no relief could have been granted.

Many other questions have been raised on the appeal as to the sufficiency of the petition. These questions have not been considered for the reasons already indicated.

The demurrer was properly maintained.

C. W. West for appellants.

Wm. Lindsay and W. P. D. Bush for appellees.

CAMPBELL, &c. v. CAMPBELL'S TRUSTEE, &c.

(Filed May 28, 1880.)

1. The equity of the wife is superior to the equity of the husband's creditors where she had agreed to sell her land and invest the proceeds in another tract, on the condition that the deed should be made to her, and the vendor, knowing the source whence he was paid, made the deed to her husband without her knowledge or consent, and upon her discovery and complaint of the wrong the husband conveyed the tract to another, who, on the same day, executed a deed to the wife.

2. Husband's right of courtesy in this State is not subject to the payment of any separate debt or responsibility of his during the life of the wife.

3. A purchaser from the husband, while the legal title was in him, without notice of the trust and the wife's resulting equity, might hold the land against her.

4. A creditor who has not been misled or defrauded by any voluntary act of hers, and who fails to assert his claim before the completion of her legal title, can not be preferred over her prior equity.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Hargis.

At the time the appellants, Josephine Campbell and S. L. Campbell, intermarried the latter was possessed of considerable estate, and was thought to be solvent by the community in which he resided, and his wife was the owner, by gift from her father, of a tract of land worth about \$4,000.

She agreed with her husband to sell her land and invest the proceeds in another tract larger and more valuable than hers, lying in the same county and contiguous to his lands, upon which they resided, upon the condition that the deed should be made to her.

In pursuance of that agreement she united with him in the sale of her land and the proceeds thereof were paid for the other tract, containing 181 acres, to the vendor, Denny, who,

although he knew the source whence he was being paid, made the deed to her husband without her knowledge or consent.

This price agreed to be paid for the tract purchased from Denny was \$7,800, the remainder of which was paid out of her distributable share of her deceased father's estate before any part thereof came to the hands of herself or husband.

Denny, being the administrator of her father, retained of her distributable share enough to pay the residue of the purchase price, and they executed to him their joint receipts therefor, which was charged to her in his fiducial settlement.

Some six months after the deed was made by Denny to her husband, she discovered the condition of the title, and complained of the wrong that had been done to her. And about two months thereafter her husband conveyed the 131 acres, in consideration of one dollar, to Alexander Campbell who, upon the same day, executed a deed therefor to the appellant Josephine.

All of said deeds were either recorded or lodged for record before the institution of this action by her husband's trustee to ascertain assets and pay debts to the extent of his property, which he had assigned for the benefit of his creditors.

It appears that the husband did not pay any part of the \$7,800, but the whole of that sum was paid by the wife with the proceeds of her land and distributable share. It, therefore, follows that her equity is superior to the equity of his creditors, and unless some inexorable legal rule can be interposed to defeat her claim to the 131 acres of land, justice demands that it should not be taken from her for their benefit:

She neither consented nor acquiesced in making the title to her husband, and her conduct is without fraud, and free from any just suspicion of dishonesty.

And this court has held in the case of *Miller and Wife v. Edwards, &c.*, 7 Bush, 397, the facts of which are analogous in this case, that "such a contract as that made with her husband before her land was sold is valid and enforceable as between the parties to it, as a prudent mode of preserving her estate against his improvidence or capricious power." (*Lady Armidel v. Phipps*, 10 Vesey, 146; *Livingston v. Livingston*, 2 Johns, 589.)

This principle of law seemed to be so well established that the court said in that case "it now requires no citation of authorities in its support."

The case of *Wickes v. Clarke*, 8 Paige, 191, cited by appellee's counsel, does not sustain their position, but, on the contrary, it is in accord with the doctrine above quoted.

The vice chancellor said in that case intentional fraud must appear to render void a voluntary settlement, even as to creditors whose debts existed when the deed was made. He very properly distinguished this class of cases from the ordinary case of a husband making a settlement of his own property upon his family under similar circumstances, and then went on to say, "with respect to both real and personal property which comes to the wife by gift or inheritance, and in which the husband gains an estate or interest in law by virtue of the marriage, the wife's equity, as it is called, entitles her to a settlement which this court will invariably enforce in favor of the wife, and even the children of the marriage, against the husband and all claiming under him, such as assignees or creditors, especially whenever they are obliged to seek the aid of the court to reach the property." (Clancy, 440.)

The chancellor concurred in the conclusion of the vice chancellor, except so far as he upheld the conveyance of the husband's interest as tenant by the curtesy initiate.

Such an interest being his absolute property, independent of his wife, and subject to his debts by the laws of New York, could not be voluntarily parted with to the prejudice of antecedent creditors.

But no such rule can prevail in Kentucky, because section 2, chapter 52, General Statutes, provides: "The husband's contingent right of curtesy shall not be sold for, or otherwise subjected to, the payment of any separate debt or responsibility of his during her life." Her husband's conveyance of such a right did not, therefore, prejudice his creditors, who could not subject it to their debts in any event. Nor does this case fall within that class of cases founded on parol antenuptial contracts, which are in contravention of the statute of frauds.

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It is a postnuptial contract, not prohibited by that statute, whereby the husband became the trustee of the wife, for a commensurate and highly meritorious consideration, and the execution of the deed by him to Alexander Campbell, and by the latter to the appellant Josephine, was in effect what a court of equity would have compelled him to do before he could have reduced her property by its aid to his possession. (Story's Eq., volume 2, section 1377a.) And his creditors, who have been "obliged to seek the aid of the court to reach the property," stand in no better attitude than he. And as this court said in the case of Lattimer, &c. v. Glenn, &c., 2 Bush, 544, "she having the legal title, with an equity untainted with illegality or fraud, can not be disturbed." (Agnewworth, &c. v. Haldeman, &c., 2 Duvall, 566, and authorities therein cited.)

The order of lodging the deeds for record, whether before or after the deed of assignment, does not affect the rights of the appellant Josephine for the reason found in Miller and Wife v. Edwards, where it is said of a state of fact nearly identical with those of this case: "Even without any explicit stipulation, an available trust resulted by implication, unaffected by the statute of frauds or of conveyances."

And although a purchaser from the husband, without notice of the trust and the wife's resulting equity, while the legal title was in him, might hold the land against her, still a creditor who has not been misled or defrauded by any voluntary act of hers, and who fails to assert his claim before the completion of her legal title, can not be preferred over her pure equity.

It is not necessary to review the other authorities cited as they embrace quite a different state of facts from those disclosed by this record.

The judgment is, therefore, reversed and cause remanded, with directions to dismiss the petition so far as it seeks to set aside the deed from Alexander Campbell to Josephine Campbell and her children, and for further proper proceedings.

R. M. & W. O. Bradley for appellants.

Burnam, Chenault & Burnam for appellees.

BILLINGTON v. COMMONWEALTH.

(Filed June 2, 1881—Not to be reported.)

1. The authority of agent to bind principal as surety must be in writing—The signature of the surety, written by his agent to a bond, in his presence and by his oral direction, can not be construed to be the act of the surety. Chapter 22, section 20 of General Statutes, provides: "No person shall be bound as the surety of another, by the act of an agent, unless the authority of the agent is in writing, signed by the principal; or if the principal do not write his name, then by his sign or mark made in the presence of at least one creditable attesting witness."

2. Section 85 of the Criminal Code, providing that a bail bond shall not be invalidated by reason of irregularities, does not apply in a case like this, when the question is of execution or nonexecution of the bond, but applies to the construction of the bond when its execution is not denied.

Appeal from Ballard Circuit Court.

Opinion of the court by Judge Hines.

L. M. Billington being in custody charged with "ku-klux-ing" was admitted to bail in the sum of \$300, with appellant as surety in the bond. On failure of the accused to appear and answer the charge the bond was forfeited, and to a rule to show cause why judgment should not go on the forfeiture appellant responded that he did not sign his name to the bond; that he did not make his mark to the signature appearing thereto, and that he never authorized any one in writing to sign his name to the bond. To this response a demurrer was sustained and judgment rendered against appellant. It is agreed in the bill of evidence that appellant was examined as to his qualification as bail, and that in the presence of the judge, who accepted the bond, he directed the attorney for the accused to sign his name to the bond; that the name was signed in the presence of appellant as directed, and that thereupon, and by reason of the execution and delivery of the bond, the accused was released from lawful custody.

Counsel for appellant insists that no liability attaches by reason of the execution of the bond because of the failure to comply with section 20 of chapter 22 of General Statutes, which is as follows:

"No person shall be bound as the surety of another, by the act of an agent, unless the authority of the agent is in writing, signed by the principal; or if the principal do not write his

name, then by his sign or mark made in the presence of at least one creditable attesting witness."

The language of the section seems to be imperative and without exception that in all cases of suretyship, in order that the act of one may bind another as surety, such act must be done under written authority from the one held to answer as surety.

Unless then the signature by the attorney, in the presence of appellant and by his oral direction, can be construed to be the act of appellant and not that of his agent, there appears to be no escape from the conclusion that appellant is not bound as surety on the bond. Why a thing done in the presence of the one directing it is any the less an act of an agent for his principal than if the act was done in the absence of the principal and by his previous direction is difficult to conceive. In either case the thing done is but the performance of a physical act which is in conformity to the will of the principal, and in all such cases the law seems to contemplate that the will of the principal shall not be made binding upon him unless it be expressed in writing. In other words, that the best and only evidence of the intention of the principal to bind himself as surety is the written authority from the principal.

The 85th section of the Criminal Code does not apply in a case like this, when the question is of execution or no execution of the bond. That section applies especially to the construction of the bond when its execution is not denied.

We think the court below erred in sustaining the demurrer to appellant's answer.

Wherefore, the judgment is reversed and cause remanded, with directions for further proceedings.

L. D. Husbands and C. H. Thomas for appellants.

P. W. Hardin for appellee.

DUNLOP v. DUNLOP.

(Filed June 8, 1881.)

1. Action for divorce by wife resident in another State against husband resident in this—Chapter 52, article 3, section 4 of the General Statutes, provides that an action for divorce shall not be brought by one who has not

been a continuous resident of the State a year next before its institution; but this provision can not be made to apply to the wife, when she is living in another State, apart from her husband, while his domicil or place of residence is within this State.

2. The domicil of the husband is in law the fixed residence of the wife. —She may live elsewhere, but her legal residence is with her husband; and the words "continuous resident for more than one year in this State," when affecting the rights of the wife, must be so construed.

3. The courts of this State in a case like this will not recognize as binding upon them the judgment of a sister State divorcing the wife from the husband, where the husband was an actual and bona fide resident of this State at the time of the separation, taking place here, and the wife seeking another jurisdiction for the purpose of dissolving the marriage relation.

4. In an action for divorce by wife on the ground of the existence of an alleged loathsome disease in the husband, it would be technical to hold that the defendant contracted the disease in another State, and that the cause of divorce originated there, when it is alleged that the defendant had the disease at and before the marriage.

The sole question presented by the record in this case is, did the appellee have syphilis, and was that disease communicated by him to his wife; and further, did he conceal from her the fact of his having that disease?

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

The parties to this action were married in the State of Virginia on the 6th of February, in the year 1878, and in a few days removed to the home of the husband at or near Louisville, Ky.

The wife returned to the home of her parents in about five or six months after the marriage, where she has since remained.

The husband has continued to reside in Kentucky, and on the 19th of February, 1879, the wife instituted this action against him in the Louisville Chancery Court for a divorce and alimony, on the ground of the existence of an alleged loathsome disease upon him at the time of the marriage, and his concealment of that fact from her.

The chancellor dismissed her petition, and she has appealed.

It is maintained by counsel for the appellee (the husband) that the wife being an actual resident of the State of Virginia at the institution of the action, the courts of that State alone had the jurisdiction to hear and determine her complaint. In that position we can not concur. The domicil and residence of the husband was in Kentucky when the action was brought,

and he had been living within the State for more than one year, and his counsel must give to the chancellor the jurisdiction.

The statute of this State, with reference to this character of action, required the suit to be brought in the county where the wife usually resides, and, being local in its application, can not be construed to mean that, if actually living out of the State, the action must be brought where she resides, thereby divesting the courts of this State of jurisdiction.

It is true the statute provides that the action shall not be brought by one who has not been a continuous resident of the State for a year next before its institution; but this provision can not be made to apply to the wife because she is living in another State apart from her husband, when his domicil or place of residence is within this State.

The domicil of the husband is in law the fixed residence of the wife; she may live elsewhere, but her legal residence is with the husband, and the words continuous resident for more than one year in this State, when affecting the rights of the wife, must be so construed; otherwise, she is deprived of any remedy unless she returns and lives within the State for the mere purpose of enabling her to sue her husband.

It is certain that the courts of this State would not recognize as binding upon them the judgment of a sister State divorcing the wife from the husband in a case like this, where the husband was an actual and bona fide resident of this State, the separation taking place here, and the wife seeking another jurisdiction for the purpose of dissolving the marriage relation. The chancellor would determine in such a case that her residence was in Kentucky, and that she could not abandon her husband and his home to make such complaint in another jurisdiction.

This present question was decided in the case of *McGuire v. McGuire*, 7 Dana, —, when this court said that no such divorce would be recognized or held as valid.

The husband and wife living in Kentucky when the separation took place, and the cause for the divorce accruing here, the fact of the wife being out of the State when she instituted the action will not be adjudged by the chancellor as depriving

him of the jurisdiction; and, although she may be living out of the State, that fact will not be regarded as a change of residence or domicile so as to give the foreign State or Territory jurisdiction to annul the marriage contract.

It is conceded that the actual residence of the appellee is now, and was at the time of the separation, within this State, and that he has at all times been within the jurisdiction of its courts; and if the wife contracted the disease at or after the marriage the chancellor will not stop to inquire whether it was communicated to her during the first or second week of their married life. If she had this disease, and it was caused by reason of the marital relation, she was as liable to have been impregnated with the poison in this State as in Virginia. (Code of Practice, section 76 of title 5, as to the jurisdiction of the chancellor.)

If the wife is not in the State the suit must be brought in the county of the husband's residence.

It is alleged in the amended petition that the disease existed and was upon him in this State at the time of their marriage, and that the concealment occurred in this State, and it would certainly be technical to hold under the original pleadings that the appellant must have contracted the disease in Virginia, and that the cause of divorce originated in that State, because it is alleged that the appellee had the disease at and before the marriage. The sole question presented by this record is, did the appellee have syphilis, and was that disease communicated by him to his wife; and, further, did he conceal the fact of his having this disease from her?

The testimony found in the record presents a singular state of case, and but for the peculiar condition of appellee's genital organs shortly before his marriage a doubt might possibly arise as to the matter in which this unfortunate plaintiff contracted the disease. That her whole system was inoculated with syphilitic poison, and she made a wreck by reason of its ravages upon her, is clearly established if the opinion of men skilled in medical science, who actually saw and administered to the patient in her sufferings, are to be considered by the chancellor. These medical men not only testify as experts,

but actually examined and treated the unfortunate wife for the disease, and it is impossible, or at least improbable, that men of such standing in their profession could be mistaken, or that they would not only stultify themselves but blight forever the future of the young wife by mentioning her in connection even with the horrid disease, merely for the purpose of gratifying her parents in their desire to have the marriage dissolved; nor is it to be presumed that her father and mother, or either, are so destitute of parental feeling as to ruin forever a daughter they have raised so tenderly and loved so well for no other purpose than to obtain this divorce. Their love and affection for the daughter, evidenced upon almost every page of this record, repels any such conclusion, and there can be no doubt but the appellant contracted the disease shortly after the marriage, and that it was communicated to her by the appellee; that she might have contracted the disease by accident is unquestioned, and such a conclusion might be reached if there were no other facts in this case than the statements of learned physicians who examined the appellee after this suit was instituted, and even the statements of medical gentlemen who treated the appellee for the sore on his male organ shortly before his marriage.

The entire proof shows that up to the time of the marriage the wife was a robust, healthy and beautiful girl, and every effort to show that the disease was hereditary, or not the disease alleged to have existed, has been successfully refuted: that shortly after the marriage the syphilitic symptoms manifested themselves, and in a little while her entire system was infected with it; that the appellee was diseased is evident, and that shortly before his marriage he became restless and uneasy in regard to his condition, and consulted physicians in Baltimore and Louisville to know the nature of the disease. It is true some scientific men were of the opinion that it was herpes and not syphilis, and if they are not mistaken the appellant, by some of her associations, became infected with the poison, still this view of the question can not be maintained.

Her social relations were of as high an order as that of any young lady in Virginia. Neither her family or neighborhood associations would authorize any such a conclusion; nor will the chancellor close his eyes to the fact that no appearance of

any such disease ever manifested itself upon the young woman until after the marriage was consummated, and then within the prescribed time, as ascertained by medical science and stated by learned physicians in this case, the disease and its effects began to develop. Dr. Yandell gives the appearance of the diseased organ with a sore as large or larger than his thumb nail, disfigured by a chancroid, and by a discharge from the urethra; and although he had in a former deposition concluded the young man was free from the disease, when, as an expert, he learns the history of the appellant, he seems to have no doubt but that he was diseased at the time of his marriage. The statements of Drs. Chisolm, McSherry, Johnson, Taylor, etc., who are distinguished in their profession, stand uncontradicted on the record as to the disease with which the appellant was afflicted, and the diseased condition of the appellee, followed by the condition of the wife shortly after the marriage, and his letters to her suggesting "I deserve nothing but hatred, but detestation," "I have wrecked your life—mine is miserable," are facts removing all trouble in arriving at a proper solution of this unfortunate controversy.

The appellee knew the opportunities he had for contracting this disease, and although the advice given him by medical men may, to some extent, palliate the wrong, he concealed from the wife that which she ought to have known, and the chancellor ought not, under the circumstances of this case, to add to her misfortune by denying the relief sought.

The plea of condonation, if properly made, but aggravates the wrong. No such plea can be maintained where the husband, protesting his innocence to a faithful and confiding wife, invites her to his bed that he may renew the evidence of his affection for her.

The judgment of the court below is, therefore, reversed and cause remanded, with directions to grant the relief asked and for further proceedings consistent with this opinion.

R. W. Woolley for appellant.

Muir, Bijur & Davie for appellee.

JOHNSON v. SOUTHERN MUTUAL LIFE INS. CO.

(Filed June 9, 1881.)

1. Waiver of right to forfeit insurance policy—The execution of a promissory note by the assured, and its acceptance with extension of time for payment, did not constitute in this case a waiver of the right to forfeit the policy, but was an agreement not to enforce the forfeiture until after the expiration of the extended time.

2. The retention of the note by the company after the failure of the assured to pay it is sufficient evidence of its determination to demand payment thereof, and operates as a waiver of the right to forfeit for nonpayment of the premium at the time stipulated. The company can not own the note and receive the benefit of the forfeiture also.

3. The company having waived the right to forfeit the policy within thirty days after nonpayment, as stipulated in the policy, the assured in this case had a right, within a reasonable time after the nonpayment, to surrender the old policy and to demand a new and paid-up policy for the equitable value of the original policy.

See opinion as to what is held to be a reasonable time in this case.

Opinion of the court by Judge Hargis.

October 21, 1869, Jilson P. Johnson's life was assured by the appellee, the Southern Mutual Life Insurance Co., in the amount of \$4,000, to be paid to his wife, if she should survive him, within ninety days after notice and evidence of his death, "deducting therefrom the amount of all unpaid notes given for premiums or loans on this policy, and all deferred premiums."

The consideration for the policy was \$129.88, in hand paid at its issuance, and of the annual premium of a like sum to be paid on or before the 21st day of October in every year during the continuance of the policy.

It was stipulated that in case the assured failed to pay the annual premiums as they became due the company should not be liable to pay the sum insured, or any part thereof, and the policy should cease and determine.

The following provision is also contained in the policy: "Provided, That if this policy shall become null and void by reason of the violation of any of the foregoing conditions, all payments made hereon shall be forfeited to said company; but if three or more full years' premiums shall have been paid hereon, a new and paid-up policy will be issued by said com-

pany, upon demand thereof, within thirty days after the said forfeiture, for the equitable value of the original policy."

Johnson paid the annual premiums to October 21, 1874, covering a period of five years.

The company loaned to him on each of the first and second annual premiums the sum of \$48.

For the annual premium due October 21, 1875, he paid \$22.88, and executed his promissory note on that day for the residue of the premium, payable ninety days after date, with interest at 8 per centum per annum until paid.

He failed to pay the note at its maturity, and on the 17th of February, 1876, he was notified by the company that it claimed the forfeiture of his policy. During Christmas week, 1876, Johnson, through his agent, demanded a new and paid-up policy for the equitable value of the original policy, which he at the same time offered to surrender.

The company refused to accept the original or issue a paid-up policy.

Thereafter, on the 1st of February, 1877, Johnson and wife instituted this action to compel the company to issue to him a paid-up policy.

They alleged substantially the facts above recited.

To the petition a demurrer was sustained, and upon their appeal the cause was reversed, this court in its opinion saying: "We do not regard time as so much the essence of this covenant in the contract that appellant forfeits his right to a paid-up policy by a failure to apply within the prescribed time. He should, however, have surrendered the original and demanded a paid-up policy within a reasonable time."

The company, on the return of the cause, filed an answer, relying principally upon the ground that the demand for a paid-up policy was not made within a reasonable time. Upon that issue the court again rendered judgment against them, and Mrs. Johnson, her husband having died, prosecutes this appeal.

The execution of the note for \$107, and the extension of time for its payment beyond the day on which the annual premium was agreed to be paid for the year ending October 21, 1875, did not constitute a waiver of the forfeiture of the policy upon the part of the company, but it was an agreement not to enforce

the consequences of the forfeiture for ninety days after the period at which it was originally agreed the forfeiture should take place. (10 Bush, 314.)

But the assured was entitled to the policy so far as the payment of the \$22.88 would carry it beyond the period for the payment of the whole premium for that year.

And the execution of the note not only alters the time of payment of the annual premium for the year it was given, but its acceptance sheds considerable light upon the meaning of the clauses of the contract above quoted.

The expressed reservation of the right to deduct from the amount of the policy all unpaid notes given for premiums evidences the supposed contingency that has happened in this case, that notes could be given for annual premiums, and collected by the company after their maturity, either by deduction from the amount assured, or by suit thereon so long as they remained unpaid and the property of the company.

The appellee, upon entering up the forfeiture it claims, and giving notice thereof to Johnson, did not offer to surrender his note, but retained it long after demand had been made by him for a new and paid-up policy, and alleges in its answer that "said note is owned and held by defendant."

The retention of the note by the company as its property was sufficient evidence of further grace and a determination upon its part to demand the payment thereof after the request to issue the paid-up policy had been made.

It could not own the note and receive the benefit of the forfeiture also.

The right to the forfeiture results from the failure of the assured to pay the annual premiums at maturity, and whenever the forfeiture is properly claimed the note or promise to pay the premium ceases to rest upon any consideration, as the only consideration of the note or promise is its power to carry the policy, and that being destroyed by the forfeiture, leaves it nudum pactum.

By the express contract the power of the note executed by Johnson to carry the policy beyond the annual period for the payment of premiums was limited to ninety days, and it could have continued no longer had the company notified Johnson

of the forfeiture of his policy, and surrendered, or offered to surrender, his note and all claim thereto.

But as it did not do so he had the right to treat the action of the company as a waiver of the forfeiture, and a continuation of the credit extended to him for the premium embraced in part by the note.

While the right to forfeit a policy exists when the assured fails to pay his annual premium, still it is not recognized because of any inherent justice in itself, but solely on the necessity of prompt payment arising from the nature of life insurance, and of the rights of others assured and mutually interested in the continued ability of the company to meet its obligations. And in order to inflict the forfeiture the company is required to adhere inflexibly to the contract and its modifications, and to avoid attempting to secure profits which may result from the variation of its terms, and the inability or neglect of the assured to comply with the added or altered condition.

If the company intended to insist upon the failure to demand a paid-up policy, either within thirty days or a reasonable time after Johnson's note became due, it should have returned his note and released him from all obligation thereon. (14 Bush, 71.)

It follows, therefore, that the right of the company to claim the forfeiture for the year ending October 21st, 1875, was waived by the retention of Johnson's note, and no further right of forfeiture accrued to it until his failure to pay the annual premium, which became due October 21, 1876.

As the company gave him no notice thereafter that it would treat his policy as forfeited, it might well be questioned whether the company could claim a forfeiture in this case even without a tender of the original and a demand of the new policy by Johnson.

But regarding the suit begun by him and his wife on February 1st, 1877, as notice of the company's assertion of the right to forfeit for the nonpayment of the annual premium due October 21, 1876, still the whole period between that date and the institution of the suit was but a little over three

months, within which, during Christmas week, demand of a paid-up policy was made by Johnson's agent, and this, too, within two months and ten days after a forfeitable failure to pay had occurred.

And without adopting the former decision herein for a precedent in any other, but regarding it as the settled law of this particular case, we are of the opinion that an offer to surrender the original and the demand of a new and paid-up policy were made within a reasonable time.

Wherefore, the judgment is reversed and cause remanded for further proceedings consistent with this opinion.

D. M. Rodman and J. K. Goodloe for appellant.

Barrett & Brown for appellees.

EVANS v. COMMONWEALTH.

(Filed June 11, 1881.)

1. Detaining female against her will and consent—Chapter 25, article 4, section 9 of the General Statutes, was intended to punish those who detain females against their will and consent for the purpose of having sexual intercourse with them, and to create a lesser offense than that of rape, or an attempt to commit rape.

2. Credibility of witnesses—It is with the jury, from their knowledge of the parties, to believe or discredit the statements of witnesses.

3. Testimony of witnesses to show conflicting statements by a witness, without first laying the foundation for such testimony, was properly excluded in this case.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Pryor.

The accused was indicted and convicted under the following statute: "Whoever shall unlawfully take or detain any woman against her will, with intent to marry such woman, or have her married to another, or with intent to have carnal knowledge with her himself, or that another shall have such knowledge, shall be confined in the penitentiary not less than two nor more than seven years."

This statute was evidently intended to punish those who detain females against their will and consent for the purpose of having sexual intercourse with them, and to create a lesser offense than that of rape, or an attempt to commit rape.

The facts of this case have been passed upon by a jury, who

were the sole judges of the guilt or innocence of the accused. He was tried by a jury of his neighbors, or men of his county, and it is not to be presumed that, under the circumstances of this case, they have acted without proper deliberation, when the result of that action has been to convict the accused of a great crime.

The testimony of the injured party is that the accused overtook her on the road, riding in before her, and proposed to have sexual intercourse with her, and she refused; that he dismounted and took hold of the bridle of her horse, and wanted to take her off the horse, taking hold of her and making the effort to pull her off. If this statement is to be believed the accused is guilty, and was properly punished.

It was with the jury to believe or discredit the statements, and, knowing the parties, they have said the statements of this witness are true. An effort was made to destroy the effect of her testimony by showing that she had made conflicting statements in regard to the matter, and also to prove that she had made certain statements without first laying the foundation for the introduction of such testimony, and this proof was properly excluded; still various witnesses were introduced and sworn who stated that this prosecuting witness had made different statements from those made under oath, yet the jury credited her testimony, and this court can not reverse such action, and if the right existed, we are not prepared to say that the verdict was wrong.

This statute was intended to protect females from such outrageous assaults, and the instructions given were as favorable for the appellant as the facts authorized.

Judgment affirmed.

W. R. Randall and R. L. Ewell for appellant.

P. W. Hardin for appellee.

GANO v. McCARTHY'S ADM'R.

(Filed June 11, 1881.)

1. The mere fact of possession by a third person of a promissory note, not payable to bearer, without assignment thereof by the payee, is not prima facie evidence of ownership.

2. The legal presumption is that the title and right to possession of a promissory note are in the payee, and in an action by the payee or his personal representative to recover possession of the note the burden is on the defendant claiming the note to show that his possession is rightful.

The payee or his personal representative is not required to show that he has been deprived of the possession by an unlawful act of the defendant, but the burden is on the defendant to show his title and right to possession of the note.

In this case the facts that the niece lived with plaintiff's intestate at his death, and that he had no children, are not circumstances authorizing the conclusion that the note was given to her.

In *Gill v. Johnsons' Adm'r*, 1 Met., 649, the note was not claimed by the payee or his personal representative, the controversy being between the payor and the third person in possession of the note.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Pryor.

In the year 1872 Samuel Devore executed and delivered his note to one Florence McCarthy for \$800. McCarthy died in the year 1875, and the payor, Devore, died shortly after. Mary Strachan, a niece of the intestate McCarthy, after the latter's death, assigned this note for a valuable consideration to the appellant, R. M. Gano. The administrator of McCarthy (Tarlton) instituted this action against the administrator of Devore, seeking to recover the amount of the debt. Devore's administrator pleaded that the estate of his intestate was owing the note, and as the administrator he was ready and willing to pay the debt, and tendered the money into court, and further alleged that the appellant, R. M. Gano, was in possession of the note and claimed to be the owner. He asked that the parties be compelled to interplead and their rights determined. Gano came into the case by his petition, in which it is alleged that the note was executed by Devore to plaintiff's intestate, and by the latter, sometime prior to his death, assigned to his niece, Mary Strachan, for a reasonable consideration, or delivered as a voluntary gift, and that Mary Strachan, for its full value, transferred the note to him. The issue being made and proof heard, the court instructed the jury to find for

the plaintiff, and this is assigned as the principal ground for a reversal. There was no assignment of the note by the appellee's intestate to his niece, and the only question is, was the possession of the note under the circumstances such evidence of ownership as required the jury to pass on the issue made? We think not. Here was an issue directly made as to the title and ownership of the note by the personal representative of the party to whom the note was executed and delivered. It is conceded by the pleadings, and shown by the proof, that the note was executed and delivered to the plaintiff's intestate; and his original title and possession being unquestioned, the burden was on the party claiming the note to show the manner in which his assignor derived title, and the mere fact of possession upon such a state of facts was not prima facie evidence of ownership. That there might have been such a gift of the note or actual sale of it by the intestate to his niece as to prevent a recovery by his personal representative is not doubted, but such a defense must be sustained by the proof, and the law will not presume the existence of such facts from the mere possession of the note by the claimant as will deprive the owner of the title. The presumption is that the title and right to the possession is with the original owner, and the burden is on the claimant to show that his possession is rightful. The party admitted to be the original owner is not required to show, in addition to the title and possession in himself, that this possession he has been deprived of by the unlawful act of the defendant, but the explanation as to how the claimant derived title and possession is with the latter. If the recognized rule of law applicable to the ownership of personal property is to be applied to a due-bill or noncommercial paper in the possession of the party claiming it, still the recovery in this case was properly denied. The possession of personal property is prima facie evidence of ownership, but where the party claiming to be the owner establishes his title, and the fact that he was in possession, and the party against whom he is seeking the recovery claims to hold under him, the mere fact of possession by the claimant is not such evidence of his possession being rightful as will prevent the recovery. It would be an easy matter to deprive the owner of his property, if in such a case he is required not only to make his action good by show-

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ing title in himself, but must, in some other manner than the exhibition of his title, negative the idea that the possession of the defendant is wrongful. A sues B for the possession of his horse and proves the original ownership and possession, and B claims to have derived title by purchase or by gift from A; now in such a case it would be an extremely dangerous doctrine that would recognize the right of property in B by presuming a sale or gift from the mere possession alone.

In this case the fact that the niece lived with the plaintiff's intestate at his death, and he had no children, are not circumstances authorizing the conclusion that the note was given to her. There was no assignment upon it to the niece, and the transfer by her to Gano was after the death of the intestate, and no attempt to prove that she acquired it for a valuable consideration, or that it was given to her, other than the mere possession of the paper.

The exclusion from the jury of the statements made by Mary Strachan at the time she assigned the paper to the appellant is also assigned for error. The appellant offered to prove that at the time she assigned the note she told him that she had acquired it as a gift from her uncle. It is not claimed that it was competent for the purpose of showing the gift, but that it was a part of the *res gestæ*, and should have been admitted. If not competent to establish the gift, we can not see how the appellant has been prejudiced by excluding it.

That she claimed the note as belonging to her is clearly shown by the fact of her assignment and sale of it to the appellant; and that she had the possession of it at the time is admitted, and the only effect of the admission of such evidence would have been to mislead the jury.

The nature of her claim is fully set forth in her pleading, and that she claimed to hold the note in some other way is not pretended to be shown by the appellee; so there was no necessity for permitting the introduction of such proof to show the manner of her claim. The manner of her claim fully appears, and the only question is, does the proof sustain it?

This court, in [the case of Gill v. Johnson's Adm'r, 1 Metcalfe, —, decided that possession of a note by a party who was

not the payee, and held it without assignment, was *prima facie* evidence of ownership. In that case there was no claim made by the real owner, and it was held upon a general traverse made for the nonresident defendant that the possession and production of the note was sufficient evidence of the plaintiff's equitable right; yet in that case it was said the plaintiff should have made the personal representative of the payee a party to the action.

While the law presumes ownership of personal property by reason of possession, this presumption may be destroyed by the facts of the particular case. Here is the naked possession of the note by a stranger, and a possession no doubt acquired in the best of faith; still it is urged that the party to whom the note was given, and to whom it was made payable and delivered, must be required to prove that he never assigned it to the party who has transferred it to the appellant. It may well be doubted whether the presumption of *bona fide* ownership from the mere possession should apply in a case like this.

In Daniel on Negotiable Instruments, section 12, in discussing the question of title from such possession, it is said: "But the presumption of *bona fide* ownership does not apply where the instrument is not payable to bearer unless it be endorsed specially to the holder or in blank." (Bradford v. Ross, 3 Bibb., —; Bell v. Mitchell, 3 A. K. Marshall, —.)

The holder, however, may waive the equitable right, and where this right is not controverted, or, if denied, is not negatived by the proof, under our system of pleading we do not see why this equitable right would not be adjudged from the possession and production of the paper.

In this case it was proper to find for the plaintiff, and a verdict for the appellant could not have been sustained.

Judgment affirmed.

Morton & Parker for appellant.

Breckinridge & Shelby for appellee.

DENNY, &c. v. McATEE'S ADM'R.

(Filed June 4, 1881—Not to be reported.)

1. Private entertainment without contract creates no liability.
2. Homestead is subject to pay money borrowed to purchase the land. The borrowed money is held to be as purchase money in this case.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Hines.

There is no evidence that appellee's decedent agreed to pay board, and it was, therefore, proper not to allow the set-off for that claim.

The evidence is conclusive that the money was borrowed to pay for the land sought to be subjected; that it was so applied, and that it was at the time agreed that appellee's decedent should have a lien upon the land for its repayment. This was sufficient, as between the parties, to give a lien and to deprive appellant of his right to claim a homestead as against this demand. This demand is, under the spirit of the homestead law, purchase money. The description of land in the petition and decree is sufficient.

Judgment affirmed.

Owen & Ellis for appellants.

Little & Slack for appellee.

MEYER & HEY v. DUPONT, &c.

(Filed June 21, 1881.)

1. Appropriation by a corporation to other corporate purposes of a fund subscribed for a particular purpose—Capital stock subscribed by a city to a railroad company upon condition that it should be applied to the construction of a designated portion of the road was not illegally appropriated by being applied to the payment of a mortgage debt of the company's when the designated portion of the road had been constructed by the company's own means.

2. Third persons employed to construct the designated portion of the road, not being parties to the original contract, had no lien upon the stock subscribed by the city for the purpose of constructing such designated portion; nor can they hold the directors personally liable for paying one debt in preference to another.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

There is no question but that the president and directors of the Elizabethtown & Paducah Railroad Co. can be made individually liable for a fraudulent, and even for a wrongful or illegal, appropriation of the corporate funds of the company. The question arises in this case, are the facts alleged in the petition sufficient to create such a liability? The subscription of \$1,000,000 made to the capital stock of the company by the city of Louisville was to be paid or realized by the issual of the bonds of the city, the bonds to be sold by the president and directors, and when sold the proceeds to be paid to the commissioners of the sinking fund of the city, and to be paid by these commissioners to the president of the company upon or for work in the construction of forty-five miles of continuous road, beginning at the city of Louisville; in other words, the survey was to be paid as the work progressed: One-half to be paid when the chief engineer certified that this much is due for work completed on the first thirty miles of the road, beginning at Louisville, and the other half to be paid upon a similar statement by the engineer that the same is due for work actually done on the remainder of the road; and if the amount so dedicated to the construction of either part of the road shall be more than is necessary for that purpose, it may be applied to the construction of other parts of the road. The company was also required to execute an obligation to the effect that the proceeds of the bonds would be thus applied, and in no event, as provided by the 9th section of the ordinance constituting the contract between the parties, was the subscription of stock to be subjected to the present mortgage of the Elizabethtown & Paducah Road.

The object of the city of Louisville was to secure the application of the funds subscribed to the construction of the road next to the city, and for this purpose the sinking fund commissioners were required to retain possession of the funds, and pay them out to the president as the work progressed in the manner specified by the ordinance. After this contract had been made by the company and the city, in pursuance of the act of February 18, 1878, the present appellants entered into a contract with the railroad company by which they undertook

to construct two sections of the road within thirty miles of the city for \$68,000, to be paid them as the work progressed, the company retaining 15 per centum of the amount actually due until their entire contract was completed. It is alleged that the company had in its possession a sum sufficient out of the proceeds of the bonds to pay them in full; that they had completed their contract, and there was still due them \$13,000; that it was the duty of the directors to have paid them out of this fund, but in disregard of that duty they had fraudulently and illegally taken the money and paid it as interest on the old mortgage of the Elizabethtown & Paducah Railroad Co., not leaving enough to pay any part of the balance due the appellants. That the company had gone into bankruptcy; was insolvent, and the president and directors, by reason of their wrongful and fraudulent acts, were personally liable, etc. The contract made between the appellants and the company is made part of the petition. This contract prescribes the manner in which the work is to be done, the mode of payment, etc., but contains no stipulation by which the proceeds of the bonds in the hands of the sinking fund commissioners is assigned to the appellants, or any lien given them on this fund to secure its payment. The city of Louisville is not complaining, or a party to the action, nor is there any allegation that the road has not been completed or the work done as agreed on by the company and the city; but, on the contrary, the legitimate inference from the facts stated is, that the road has been completed and the proceeds of the bonds, or a part of them, applied in discharging the debts of the corporation. The contract between the city of Louisville and the appellees, or the railroad company, created no trust in favor of the contractors by reason of work done on this particular part of the road. It is true the fund belonged to the corporation, and when diverted from its legitimate purpose by the directors—that is, used for purposes other than the construction of the road or in payment of debts due by the corporation—the directors would have been individually liable. The appropriation of this fund to the construction of a particular part of the road was to secure the city of Louisville, and when the contract between the city and the railroad company has been complied with the contractor has no right to complain. He may have

constructed upon the faith that this fund could build the road the distance contemplated, and that the subscription would insure the solvency of the corporation; still he had no lien upon the fund, or the right to demand that the money paid him by the company should come from the proceeds of the Louisville bonds. These appellants were being paid monthly by their contract with the company, when the company was not entitled to receive any part of the proceeds of the bonds until work of the value of one-half the proceeds had been completed on the first thirty miles, and work of the value of the remaining half on another part of the road. So the appellants were being paid monthly until the work had progressed to its completion, and now the appellants insist that \$120,000 of the proceeds of the bonds had been paid on the old mortgage executed by the company, and for that reason the president and directors are individually liable. The proceeds may have been invested in this way, and yet the company have paid out a much larger sum from its own pocket than the proceeds used in paying the mortgage debts. If the appellants have a lien, or if there is a trust created by reason of their relation to the original contracting parties, no recovery can be had in the absence of an allegation that after expending the amount of means subscribed by the city of Louisville in the construction of the road, they still had a sum sufficient left in their hands, or that had been appropriated to other purposes, to pay appellants' debt.

What is the difference between paying out the actual proceeds of these bonds, and a sum equivalent to the proceeds? And if they had paid a sum equal to the Louisville subscription out of the company's pocket, why had not the company the right to pay off the mortgage if the sum realized was sufficient for that purpose? It is not a violent presumption to say that the road had been constructed by the company, or the contract complied with; and when the city had been satisfied the appellants were no more beneficiaries of the fund than any other contractor on the road. As creditor of the company they were interested in having the funds of the corporation applied to the payment of the corporate debt, and where this fund has been misapplied the directors are liable.

In the case of the *Shakers v. Underwood*, an officer of the bank had misapplied the funds belonging to the depositor by committing them to the bank's use. So in this case, if the money of the corporation is converted by the appellees in the payment of their own debts, or in the construction of some other public improvement, a liability would exist, or, as in the case of *Gratz v. Redd*, 4 B. M., —, and *L. & N. R. R. Co. v. Bridge*, 7 B. M., —, where the directors and stockholders constituting the corporations, instead of paying the debts of the corporation, took the money and sunk it in their own pockets; or where the sheriff has property of the principal in his possession to pay a debt for which the surety is liable, and destroys it or surrenders it to the debtor, in all these cases the legal rights of the parties are affected by the act of the party complained of.

Not so in the present case. The appellants are not liable for any debt to the appellees or the city of Louisville, nor has either of them any property pledged to secure any debt owing the appellant, but the debtor is complained of for not paying out of his own means a debt due the appellant in preference to another creditor of the same debtor. Here the effort is to make the president and directors liable for paying debts by the company, the same company with which the appellant contracted.

The city of Louisville requires the money subscribed to be applied to the building of the road within certain limits; the county of Hardin, upon condition that its subscription is applied to constructing the road within its county; and A, as an individual, on condition that the money subscribed by him is to be applied to the building of the road through his farm.

It is now maintained that for the labor performed upon those parts of the road designated for the application of the money that the laborer or contractor performing the work, although he makes an independent contract, having no reference to the fund, is the sole beneficiary of the fund, and that the directors are individually liable if they apply it in any other mode, although it is done by the consent of the parties with whom they or the company contracted. The company was under no obligation to pay the appellants out of the fund. They were not parties to the contract, and there was no term,

express or implied, that the company should pay it to the appellants, or that they were to become the beneficiaries of the fund, or any part of it.

Suppose the city of Louisville had the right to have issued and sold these bonds by changing the contract on other parts of the road, as would have been the case with an individual subscription, will it be contended that the appellants had such an interest in it as to prevent this change of contract between the city and the company? We think not; and as to all parties but the city of Louisville, the company, when it obtained the money, had the right to use it for any purpose connected with the corporation, either in the construction of the road or the payment of its debts. Nor was the company, by the laws of the contract with the city, prevented from applying the money to the payment of the mortgage debt. This mortgage had been made, including doubtless all the rights and franchises of the company, and the \$1,000,000 of stock about to be taken was understood not to be embraced by the terms of the mortgage. That no right to this stock or the subscription passed to the mortgagees, and if such had been the contract, if the road had been constructed with the company's own means, instead of the money from the proceeds of the bonds, the company had the right to apply it to the payment of the mortgage debt.

The city, however, has its stock, at least that corporation makes no complaint of the action of the directors, and the appellant has no right to make directors personally liable because they pay one debt of the corporation in preference to the other. It is no misappropriation of the funds of a corporation by the directors when the funds are used in good faith for the corporate purposes. To pay one debt when they could have paid another, thereby giving a preference, is not a fraudulent act on the part of the directors. It is not sufficient to allege that the directors have fraudulently misappropriated the funds of the company. It must appear in what way the fraud was perpetrated. It is said the fraud consists in paying a certain sum of money on the mortgage debt.

That, as we have already seen, is not fraudulent. The company had the right to dispose of it in that way, if the city

with whom it had contracted had been indemnified by the construction of the road. A third party has no right to complain when the city is silent, and, besides, if a trust existed, it must be alleged that the company had, or ought to have had, a sufficient sum in its hands of this fund, after the construction of the road, to pay appellant. It had the right to apply the means to the construction of forty-five miles of the road. The road is built. Now before the appellants can recover upon this theory it must be averred that this much was on hand after the construction. It is an averment indispensable to the maintenance of the action adopting appellant's theory as the law of the case. In either aspect of the case the judgment must be affirmed.

D. M. Rodman for appellants.

H. C. Pindell and Muir, Bijur & Davie for appellees.

PENNINGTON v. WOOLFOLK.

(Filed April 20, 1880—To be reported.)

1. Departments of the State government—Titles of acts of the legislature—County courts—Proceedings were instituted in the Jefferson County Court by the appellee, who is county attorney of that county, under an act, entitled "An act to amend article 8 of chapter 5 of the General Statutes," approved February 28, 1874. (Acts 1878-'4, 147.)

It was objected by the appellant in the court below that said act under which proceedings by the county attorney were instituted was unconstitutional because it sought to confer upon the county court powers of a legislative character.

Held—Said act is not unconstitutional because of the legislative powers which it confers upon the county courts. County courts are excepted out of the constitutional provision dividing the State government into three departments, being not exclusively a judicial tribunal. But said act is unconstitutional because it embraces more than one subject, and has not the subject expressed in the title.

Appeal from Jefferson Common Pleas Court.

Opinion of the court by Judge Cofer, reversing.

Proceedings were instituted in the Jefferson County Court by the appellee, who is county attorney of that county, under an act, entitled "An act to amend article 8 of chapter 5 of the General Statutes," approved February 28, 1874. Acts 1878-'4, page 147.)

By that act the general assembly attempted to re-enact sections 3, 4, 5, 6, 7, 8 and 10 of article 1, sections 1 and 5 of

article 2, and sections 2, 3, 4, 5 and 6 of article 3 of chapter 98 of the General Statutes, which had been previously repealed, and to impose upon the county attorney, of the counties respectively, the duties imposed by chapter 98 upon the revenue agent.

Section 3 of chapter 98, as re-enacted by the act of 1874, supra, and thereby made part of chapter 5, provides that when any person owning property in this Commonwealth has failed, since January 10, 1856, to list his property with the assessor, whose duty it was to assess the value thereof, or with the supervisors of tax, or the clerk of the county court, it shall be the duty of the county attorney to give information thereof to the county court of the county in which said property should have been listed; and that the court shall summon such person before it, and upon being satisfied that he has failed to list his property, "to assess and fix the value of the same for the years such property was not assessed, and the same shall be certified by the said court to the proper officer for the collection thereof."

The appellant appeared in the county court and moved to quash the summons, but his motion was overruled. He then demurred to the information, and the demurrer having been also overruled, he applied to the common pleas court for a writ of prohibition against the county judge and county attorney, forbidding them to take any further action in the proceeding against him.

The common pleas court sustained a demurrer to the petition and dismissed it. This appeal is from that judgment.

It is not claimed that the county court was proceeding irregularly if it had jurisdiction to proceed in the matter at all.

In the recent case of *Howell v. Commonwealth* (ante, —) it was contended that the statute is unconstitutional because the title does not indicate the subject of the act, but we did not find it necessary to pass upon the point in that case.

In this case the point there made is not relied upon. If, however, we find the act constitutional in other respects it will become necessary to decide whether the title is insufficient, because, if for that reason the act is void, the county court had no jurisdiction even to entertain the proceeding.

The objection taken to the act in this case is that by it the legislature has attempted to confer on a judicial tribunal a power not judicial in its nature, in violation of article 1 of the Constitution, which declares that—

“Sec. 1. The powers of the government of the State of Kentucky shall be divided into three distinct departments, and each of them be confided to a separate body of magistracy, to wit: Those which are legislative to one; those which are executive to another; and those which are judiciary to another.

“Sec. 2. No person, or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.”

The power to impose taxes is legislative, and can not be conferred, under our Constitution, upon a strictly judicial tribunal or officer.

The power to assess property for taxation—that is, to apportion the tax upon the property upon which the legislature has imposed it—is not judicial, and can no more be conferred upon a judicial tribunal than the power to levy taxes.

But the county court, although classed in the judiciary department by the Constitution and possessing judicial powers, is not an exclusively judicial tribunal.

We might not be able to sustain this position if compelled to rely alone upon the Constitution, and denied the right to look to the practical construction uniformly given to it since the formation of the government.

But in the light of the unchallenged action of all departments of the government since the adoption of the Constitution of 1792 to the present time, we entertain no doubt that the county court must now be regarded, as respects a number of matters local and exceptional in their nature, as excepted out of this provision of the Constitution.

Each of the prior Constitutions contained the precise language of our present Constitution quoted *supra*.

In 1798 (Mo. B., 508) the legislature enacted a law making it the duty of the county court “to take bond and security of the sheriff or collector” of the public revenue, and to appoint

two of their own body to settle with such sheriff or collector, and report such settlement to the court. An act of 1796 (Mo. B., 504) gave the county court cognizance of the settlement of the accounts of guardians and of admitting deeds to record. It also gave power "to grant ordinary license, and regulate and restrain ordinances and tippling houses," to purchase land and cause public buildings to be erected, and "if the court of any county shall at any time think fit, they are hereby authorized and empowered, at the charge of their county, to cause a ducking stool to be built in such a convenient place as they should direct." An act of 1810 (Mo. B., 506) gave that court power to "lay a county levy, covering the amount of claims against such county at the time of laying such levy, or which it was known would become due under engagements for public buildings by the time said levies would be collected and accounted for by the several sheriffs or collectors, adding a reasonable overplus for probable delinquents," etc.

By subsequent statutes county courts were empowered to establish roads and ferries, and to fix the rates of ferriage and the charges to be made by inn keepers. To these may be added acts giving the county court power to provide for the poor and to take measures to prevent the spread of the small-pox, and many others of a similar character which it is not deemed necessary to refer to.

That the great part, if not all, of the powers above referred to as having been conferred upon the county court, and non-judicial in their nature, will not be disputed, but in no instance of which we are aware was the constitutionality of any of these acts assailed, and certainly none of them were ever pronounced by this court to be invalid.

But we are not left to infer from the enactment and long-continued existence of statutes of a merely kindred nature to that now under discussion that it has, through the whole legislative and judicial history of the State, been regarded as competent to confer upon the county court powers not in their nature judicial, and especial powers relating to the revenue of the State.

We find that in 1819 (Mo. B., 1373-'76) the legislature enacted a law providing that the assessor should report in writing to the county court a list of all persons who had omit-



ted to give in a list of their taxable property, or who should give a false, fraudulent, or imperfect list, and also providing for a proceeding in the county court similar to that provided for in the statute we are considering, and that the court should "proceed to hear and determine the same, and give judgment for a fine and triple tax, as directed by law, and determine the value whereon to fix the triple tax;" and further, that "the court, by the report of the commissioner, oath of the party, and other competent evidence, might proceed to ascertain the articles of taxable property belonging to such delinquent or delinquents, and the value thereof." The act also provides that a person who had failed to list his property, might, although not proceeded against, list it with the county court, and that the sheriff or a private person might report any delinquent to the county court, and that the court should ascertain the articles of taxable property belonging to such delinquent and the value thereof, and shall cause to be certified to the sheriff or collector and the auditor a true list of all taxable property given into the court.

This act continued in force until it was superseded by the Revised Statutes, enacted after the adoption of the present Constitution, and its main features were re-adopted, or rather continued in force in sections 20 to — (inclusive) of article 6, chapter 83.

An act approved February 28, 1862 (Myer's Supp., 4), contained similar provisions, so far as the jurisdiction and powers of the county court are concerned, that were contained in the act of 1819.

Under that act the case of *McAllister v. Commonwealth*, 6 Bush, 581, arose. No question of the constitutionality of the act was raised, but the court, while reversing the judgment of the county court, remanded the case, with directions to correct certain specified errors, for which alone the judgment was reversed, thus recognizing, tacitly at least, the constitutionality of the provision conferring upon the county court power to assess the property of delinquents for taxation.

Whatever doubts we might otherwise have of the power of the legislature to confer upon the county court powers which are not judicial, must yield to the authority of the long-con-

tinued practical construction to be found in the statutes to which we have referred, and which have been acquiesced in by the bar and all departments of the government for more than three quarters of a century.

Since some of these statutes were enacted the Constitution has been twice amended and re-adopted. The conventions must be presumed to have been well acquainted with the fact that these nonjudicial powers had been conferred by various acts and were being exercised by the county courts, and the re-adoption of the first article in the very words of the former Constitutions was a virtual recognition of the validity of the statutes by which these powers had been, from time to time, conferred.

But the act must be held unconstitutional because its subject is not expressed in the title.

It is entitled "An act to amend article 3 of chapter 5 of the General Statutes."

Chapter 5 relates exclusively to attorneys, and article 3 relates only to county attorneys.

The design of that provision of the Constitution which requires that the subject of each act shall be expressed in the title is to prevent the use of deceptive titles as a cover for vicious legislation, by enabling members of the general assembly to form some opinion of the nature of the bill from merely hearing it read by its title.

The title of the act under consideration can only be regarded as sufficient even for the purpose of an amendment germane to the article mentioned in the title, by supposing the members were so well acquainted with the several chapters, and the subject of each, that they could, from the simple mention of the number of the article and chapter, know the subject of that particular article.

But assuming that the title would have been sufficient if the act had been restricted to matters germane to the article mentioned, the act must still be condemned.

The subject of the act is revenue and taxation, and not county attorneys. The duties imposed by it upon county attorneys are merely incidental to the main purpose, which was to provide additional means for the assessment of property and the collection of taxes.

No one would contend that the act was valid if it were entitled "An act relating to county attorneys."

Such a title would not only fail to give even an intimation of the subject of the act, but, on the contrary, would be well calculated, though not so well as the title chosen, to conceal from the members of the general assembly the real subject of the act. If the title was understood at all the only impression it could have conveyed to the mind of the legislators was that the act related to county attorneys, and it could, by no possibility, have been understood to be an act relating to the assessment of property by the county court, and the act must be held void; and as without it there is nothing to give the county court jurisdiction of the proceeding against the appellant, the court below erred in sustaining the demurrer to the petition.

Judgment reversed and cause remanded, with directions to overrule the demurrer.

R. W. Woolley and P. B. Muir for appellant.

C. B. Seymour and L. C. Woolfolk for appellee.

The foregoing opinion was suspended by a petition for a rehearing, which was overruled June 14, 1881, Judge Hargis delivering the following response of the court:

The Code of Practice, section 479, says: "The writ of prohibition is an order of the circuit court to an inferior court of limited jurisdiction, prohibiting it from proceeding in a matter out of its jurisdiction."

Before the passage of the act of February 28, 1874, which is unconstitutional and void, the county court had no jurisdiction over the subject of that act. And the void act could not create any jurisdiction for the county court.

Therefore, as the county court was proceeding in a matter out of its jurisdiction, the proper remedy was by writ of prohibition.

The case of *Arpold v. Shields*, 5 Dana, —, sustains this view.

It is true that it is said in that case "if the statute be unconstitutional that fact does not show that the magistrate had no jurisdiction over the suit, but would prove only that his judgment was erroneous;" but this was said in explication of

the other important point in that case, to wit, that the magistrate had jurisdiction to decide whether the demands were legal or void, even if the act of 1886 were unconstitutional or had never been enacted.

Hence it is clear that the magistrate's jurisdiction did not depend upon the act of 1886, and his judgment as to its constitutionality being simply erroneous was subject to revision by appeal only.

But the court also said: "If the act of 1886 be unconstitutional and, therefore, void, and if also the magistrate would not, independently of that statute, have had jurisdiction to decide on a demand for \$50 claimed as a penalty due from the defendants to the plaintiff in the warrant, there could be no doubt that he would have had no jurisdiction because his only authority would have been a void statute, which could confer no power."

The facts of this case and want of jurisdiction of the county court without the aid of the void act of February 28, 1874, bring it within the reasoning of this quotation.

Petition overruled.

R. W. Woolley and P. B. Muir for appellant.

C. B. Seymour and L. C. Woolfolk for appellee.

NAPPER, &c. v. YAGER, &c.

(Filed February 15, 1881—Not to be reported.)

A creditor must obtain judgment and return of nulla bona before he can maintain an action in equity to subject real estate conveyed, voluntarily or fraudulently, by his debtor to a third person.

Appeal from Nelson Circuit Court.

Opinion of the court by Chief Justice Cofer.

At the time the deed from Richard Napper to John H. Napper was made the latter was not a creditor of the former, and consequently the deed did not operate to prefer him as a creditor.

The deed was made in compliance with the bond executed in 1874, five years before the deed was executed.

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At the time of the execution of the bond John was a creditor, and his debt was satisfied by crediting it on the price he agreed to pay for the land. But that transaction is not attacked. There is no allegation that Richard Napper made the bond in contemplation of insolvency, or with the design to prefer one or more creditors to the exclusion, in whole or in part, of others. And it is quite clear that if no such facts existed when the bond was made its validity can not be affected by Richard's subsequent insolvency.

If it had been alleged and proved that Richard made the bond in contemplation of insolvency, and to prefer John as a creditor, the fact that a deed was made and recorded within six months before these suits were commenced would have raised the question whether the period limited in the statute for commencing a suit to enforce its provisions commenced to run when the bond was executed and possession taken under it, or not until the recording of the deed. But as no attack was made on the contract evidenced by the bond no such question arises.

We are, therefore, of the opinion that the appellees failed to make out against John H. Napper a case coming within the provision of article 2 of chapter 44 of the General Statutes.

Ludwick denies that he was a creditor of Richard Napper at the time the deed to him was made. The evidence shows that he married Napper's daughter in 1872, and that it was soon afterward agreed between Napper and himself that he should let Napper have whatever money he could spare from time to time, and should receive a conveyance of land, at a reasonable price, for the money so advanced. Under that agreement Ludwick took charge of the farm, and advanced money to Napper, and boarded a young lady for him to the amount, in the aggregate, of more than \$700, and under that agreement the deed in question was made.

The money thus advanced did not create the relation of debtor and creditor. The money was not to be repaid in kind. It was received in payment for land Napper had agreed to convey, and although the agreement was in parol and could not have been enforced by Ludwick, yet he would not become a creditor on account of the payments so made until the contract

was repudiated by Napper, and as that was never done he never became a creditor, and the conveyance was, therefore, not within the statute.

So much of the suits as sought to have the conveyances set aside as voluntary and made to hinder and delay creditors was premature.

Such suits can not be maintained without judgment and return of nulla bona. (*Moffiat v. Ingham*, 7 Dana, 495; *Halbert v. Grant*, 4 Mon., 581; *Payne v. Poague*, 6 J. J. Mar., 88.)

In *Haskell v. Wynn*, MSS. opinion, cited in section 180, *Barbour's Digest*, title "Fraudulent Conveyances," one of several plaintiffs in consolidated suits had a return of no property.

Wherefore, the judgments are reversed and causes remanded, with directions to dismiss absolutely so much of the petition of Mrs. Yager and the cross petition of Foxworthy as seeks relief under article 2, chapter 44, General Statutes, and to dismiss the residue without prejudice.

John H. Wathen for appellants.

C. T. Atkinson and Muir & Wickliffe for appellees.

We are inclined to dissent from the foregoing opinion of the Court of Appeals, and to concur with the contrary decision of the McCracken Common Pleas Court, wherein that court, Judge W. S. Bishop presiding, rendered the following opinion and judgment:

FREDELIN BROSS v. A. M. CUNDIFF, &c.

Opinion and Judgment.

The plaintiff filed this action on the 9th day of February, 1880. The object of the suit was to set aside a deed made by H. and Jennie Knight to Norman Cundiff of a tract of land in McCracken county, and subject the same to the payment and satisfaction of four notes executed by A. M. Cundiff to the firm of Stockfletch & Bross, of which firm the plaintiff was a member and is now the surviving partner. The bill charges that the consideration of the conveyance from Knight and wife to Norman Cundiff was paid by A. M. Cundiff, who procured the title to be conveyed to his son with the fraudulent intent to cheat, hinder and delay the creditors of A. M. Cundiff; but fails to allege that the plaintiff has ever obtained judgment at law on his notes and sued out execution, and had the same returned "no property found."

The defendants have all demurred, and by their demurrers they raise the question whether a court of chancery has or has not jurisdiction to set aside a fraudulent conveyance and subject the property conveyed to the plaintiff's debt in a case where there has been no judgment at law; and this is the principal question to be decided in this case.

I have examined the authorities carefully and with an earnest desire that I might be able to adopt the correct rule on this question. I have no doubt

that formerly the rule was in Kentucky that in a case like this, where the demand of the plaintiff was purely legal, courts of equity would not take jurisdiction to set aside a fraudulent conveyance until the creditor had obtained judgment and return of no property found at law. (*Milbert v. Grant*, 4 Monroe, 581, and authorities there cited.)

In the case above referred to the court say that the rule is so well settled as to render it unnecessary to discuss the subject or review the cases where the principle has been adjudicated, and it is said that the "reason that the chancellor requires a party possessing a claim purely legal to proceed to execution at law is that he should prove, by going the whole length, that the law is inadequate to afford him redress before he can call the chancellor to his aid."

Here we have the rule, and the reason of the rule, given and so well established that no court could do otherwise than dismiss the plaintiff's petition, unless by legislation subsequent to these decisions the jurisdiction of courts of equity has been so enlarged as to abrogate the rule altogether, and render the decisions wholly inapplicable.

The plaintiff's counsel contend that the jurisdiction of courts of equity has been so enlarged, and they have referred me to an act of the legislature of Kentucky, approved February 15, 1838 (3 Statute Law, page 116), under the title of "Chancery Proceedings," the second section of which is in these words: "When any person shall sell or convey, or otherwise dispose of his, her or their lands, goods, wares, merchandise, choses in action, or other property, with the fraudulent intent of cheating and defrauding creditors, or hindering and delaying them in the collection of their debts, the courts of chancery in this Commonwealth shall have power and jurisdiction, in favor of any creditor, whether the debt be due or be not due, or be or not in judgment, to set aside the fraudulent sale or conveyance and subject the property to the payment of the debts, and for that purpose to attach the property," etc.

The decisions heretofore referred to were all rendered prior to the enactment of this law of 1838, and I am of opinion that it was intended by this act to change the rule which had theretofore been so well established by authority and to so enlarge the jurisdiction of courts of chancery as to give to any creditor the right to sue in equity to set aside a fraudulent conveyance made by his debtor, without first obtaining a judgment at law.

That this was the effect of the act was expressly decided by the Court of Appeals of Kentucky in the case of *Milward v. Cochran*, 7 Ben Monroe, 344. The jurisdiction conferred by the act was not made to depend upon the issuing of an attachment, for in the case last cited the court say: "In this case no attachment was sued out, but we are of opinion the power of the court to subject the property did not depend upon the actual levy of an attachment and lien on the slaves attached upon the exhibition of complainant's bill and the service of process."

Here, then, was a departure from the old rule by express legislative sanction, and courts of equity did assume jurisdiction in the class of cases set up by plaintiff in his petition, and could no longer say to the creditor you can not come into a court of equity until you have shewn that you are remediless at law by the exhibition of a judgment and return of no property found.

I have not been able to find any act prior to the Revised Statutes which repeals the statute of 1838, or takes away the jurisdiction conferred by it.

upon courts of equity, and I am of opinion that it was not repealed by the act adopting the Revised Statutes, for the reason that the fifth exception to the repealing clause expressly exempts from the operation of the repeal statutes regulating proceedings in civil, criminal and penal cases.

The act of 1838 was found under the title of "Chancery Proceedings," and was intended to regulate proceedings in civil cases in chancery, and was, therefore, not repealed by the Revised Statutes. In *Lusk v. Anderson's Admr*, 1 Metcalfe, 426, it was held, that the act of the legislature, passed 23d of February, 1846 (page 53, General Acts, 1846), authorizing heirs, devisees or distributors to prosecute or defend an action brought by or against the administrator or executor of the decedent, was not repealed by the Revised Statutes, because it was an act regulating proceeding in civil cases, and, therefore, expressly excepted in the repealing clause, and for similar rulings in regard to the effect of the act adopting the Revised Statutes, or other laws and statutes, I refer to the cases of *Davis v. Sharron*, 15 B. M., 63, and to *Duvall*, 51 and 206. As the act of 1838 was not repealed by the Revised Statutes it was in force when the Civil Code of 1854 was adopted, and under it the courts of chancery had assumed jurisdiction and granted relief to creditors in the class of cases similar to the one set forth in plaintiff's petition from 1838 up until the adoption of the Code. During all that time it was the common practice, as I believe, for courts of equity to take jurisdiction in such cases, and set aside fraudulent conveyances without requiring creditors to first sue and obtain judgments at law. And so stood the law when the Code of 1854 was adopted; by the 4th section of which it is provided that the "plaintiff may prosecute his action by equitable proceedings in all cases where courts of chancery before the adoption of this Code had jurisdiction." The Code of 1877 is to the same effect, the 6th section of which provides that "actions of which courts of chancery had jurisdiction before the 1st day of August, 1851, may be equitable."

It is useless to attempt here any inquiry into the nature and origin of chancery jurisdiction, or to show how it grew up and was enlarged and expanded so as to include the great variety of subjects which it now embraces. We know that when the Code was adopted the chancery courts had acquired jurisdiction, either by legislative sanction or the adjudication of courts, extending to many of the most important transactions of men, and I am of opinion that it was not intended by the Code either to add to or take away or change that jurisdiction in any particular. The Code abolishes all forms, and substitutes the action by petition. It provides that proceedings in a civil action may be ordinary or equitable. It provides that the plaintiff may sue in equity in all cases where courts of chancery had jurisdiction before the 1st day of August, 1851. No other test of equity jurisdiction is given, and in determining whether a court of equity has jurisdiction to grant relief in any case the legal mind is of necessity carried back to the 1st day of August, 1851, to inquire whether courts of chancery had jurisdiction of such cases prior to that date. If the jurisdiction then existed, it now exists. The act of 1838 was not intended to create a new right except the right to go into equity in a class of cases of which courts of equity would not theretofore take jurisdiction. It related only to the remedy or mode of procedure to enforce a right. It was not intended or needed to make fraudulent conveyances void as to creditors. Such deeds were declared to be void by the act of 1796 on the subject of fraudulent conveyances, and

by every act upon that subject since, and I am of opinion that by the word creditor the legislature meant any creditor, whether he had judgment or not.

The only change in the law is that before the act of 1838 the remedy of the creditor was at law, and if that proved fruitless or inadequate, then he might come into equity, whereas now he may apply to a court of equity without proceeding at law.

I have been referred by defendant's counsel to the cases of *John H. Napper v. Catherine Yager*, decided by the Court of Appeals of Kentucky, February 15, 1881; opinion by Chief Justice Cofer.

I freely admit that this case is in conflict with the views herein expressed, but the authorities cited in the opinion were all prior to the act of 1838, and that act and the subsequent authorities and legislation upon the subject are not alluded to in the opinion, and, as I believe, the attention of the court was not called to them. The demurrer of the defendant's to petition is overruled and the plaintiff's counsel allowed to draw a judgment.

We invite a discussion of the question at issue between the foregoing decisions, and will publish articles or communications in support of either side of the question.

In order that the profession may understand precisely what was decided in *Haskell, &c. v. Wynne & Co., &c.*, referred to in *Napper v. Yager*, we insert that opinion in full:

HASKELL &c v WYNNE & CO., &c.

(Filed January 11, 1877—Not to be reported.)

Appeal from Boyd Circuit Court.

Opinion of the court by Judge Cofer.

Without entering into a detailed statement of the facts appearing in the record which have brought us to that conclusion, we concur with the circuit court in holding that the transfer to James Haskell of the note for \$1,000 executed by Poague & Chambers to J. A. Haskell, and the conveyance of the several lots mentioned in the judgment, were in fraud of the creditors of James A. Haskell. It does not matter that the debts, or some of them asserted in these suits, were created since the transfer and conveyance were made. Actual fraud vitiates such transactions as to all creditors, whether prior or subsequent.

McLean & Co. had obtained a return of no property on an execution issued upon a judgment in their favor against J. A. Haskell, and instituted their suit under section 474 of the Civil Code to obtain satisfaction of their judgment, but the other plaintiffs had not obtained either judgments or returns of nulla bona. By an amended petition, filed after the cases were consolidated, all the plaintiffs sought to bring the transfer of certain notes within the act of 1856, to prevent fraudulent assignments for the benefit of creditors, but the court adjudged against them on that branch of the case. There is, however, no appeal from that judgment, and we need not consider that question.

Damrin & Co. also sought to have two mortgages made by James A. Haskell—one to James Haskell and the other to P. C. Buffington—adjudged to be within the act of 1836; but Damrin & Co. were nonresidents of the State and failed to execute a bond for cost, and the appellants, before answer, moved the court to dismiss that action because no bond was given. The court erred in overruling that motion (11 Bush, 47), and for that error the judgment of Damrin & Co. must be reversed, and we need not consider whether the mortgages referred to were within the act of 1856 or not.

The only remaining question then is whether those plaintiffs who had not obtained judgments and returns of nulla bona could maintain their action to set aside the fraudulent deed.

Prior to the adoption of the Code of Practice it was repeatedly held by this court that when there was no obstruction to the recovery of a judgment at law a creditor could not maintain a suit in equity to set aside a fraudulent conveyance of the debtor's property until he had obtained a judgment and return of nulla bona. (*Gilpen v. Davis*, 2 Bibb, 416; *Allen v. Camp*, 1 Mon., 232; *Wyckliffe v. Lyon*, 5 J. J. Mar., 87; *Poague v. Boyce*, 6 Ib., 88; *Moffat v. Ingham*, 7 Dana, 496; *Halbert v. Grant*, 4 Mon., 581.) And in *McKinley v. Combs*, 1 Mon., 106, it was held that a creditor having a judgment and return of nulla bona on one demand could not unite with it, in a suit to set aside a fraudulent conveyance, another demand on which no judgment had been obtained.

At that time, and up to the time of the adoption of the Code, a court of equity had no jurisdiction to render a judgment upon a legal demand unless there was some impediment in the way of proceeding upon it at law, and the rule that a return of nulla bona must precede a suit in equity to subject property fraudulently conveyed by the debtor was based upon the ground that until such return was made it did not appear that the ordinary legal remedies would not prove effectual. In other words, that the chancellor would not aid a party until it appeared that he was without adequate remedy at law, and that, as respected the inability of the creditor to obtain satisfaction of his legal demand by legal proceedings and process, the only evidence deemed sufficient was a return of nulla bona.

These cases were all brought in equity and were consolidated with the case of *McLean & Co.*, who manifested a clear right to set aside the deed to James Haskell. Their execution had been returned nulla bona, and the fact that James A. Haskell had no estate out of which the debts due to other creditors could be satisfied was thereby established. Why, then, should other creditors be postponed and be subjected to the delay and they and the debtor subjected to the additional cost necessary to obtain judgments at law and returns of no property before proceeding to set aside the fraudulent deed, and subject the property thereby conveyed to the satisfaction of their debts?

The chancellor may not entertain jurisdiction of a suit upon a purely legal demand, and render judgment in personam therefor unless objection be made in the manner and at the time prescribed by law. No such objection was made in any of these cases; the insolvency of the debtor was admitted, and the only question to be tried was whether the conveyances attacked were fraudulent, and it would have been a needless circumlocution, after rendering personal judgments in favor of the several plaintiffs for their debts, to dismiss so much of the several petitions as sought to annul the fraudulent deed, in order that those plaintiffs might go through the form of issuing exceptions and having them returned no property, when in one of the consolidated cases, there was such a return, and both the actual and legal insolvency of the debtor was admitted, and the deed was actually adjudged fraudulent as to the plaintiffs in one of the consolidated actions.

As the judgment of the circuit court conformed to these views, except as to the case of *Damrin & Co.*, the same is affirmed.

The judgments in favor of *Damrin & Co.* are reversed, and the cause as

to them is remanded, with directions to dismiss their petition without prejudice.

E. F. Duffin for appellants.

Hampton & Hagar and L. T. Moore for appellees.

ABSTRACTS OF KENTUCKY DECISIONS.

CARTER v. ORME.

Filed June 4, 1881—Not to be reported.

Appeal from Rockcastle Common Pleas Court.

Opinion of the court by Judge Hargis, reversing.

He who receives the benefit of another's services, having knowledge of the service during the time of its performance, should pay its reasonable value to him who renders it.

A. Duvall for appellant.

I. A. Stewart for appellee.

HUBAN v. HUBAN.

Filed June 4, 1881—Not to be reported.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Pryor, affirming.

A conveyance, by a person in feeble condition of body and mind, to another under whose influence he was placed, no sufficient consideration appearing, was held in this case to be fraudulent and void.

R. W. Nelson for appellant.

J. S. Ducker for appellee.

CRITTENDEN v. COMMONWEALTH.

Filed June 4, 1881—Not to be reported.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Hines, affirming.

1. Criminal law—Erroneous instructions, when not prejudicial to defendant, will not entitle him to a reversal.

2. An instruction to the jury that the law imputes malice under certain circumstances is erroneous. The existence of malice, in every instance, is to be determined by the jury.

3. Such instruction in this case was not prejudicial to the substantial rights of the accused because the court, by exceptions and reservations in other instructions, precluded the possibility of the jury being misled by it.

Hunt & Darnell and Beck & Thornton for appellant.

P. W. Hardin for appellee.

MARTIN, ASS'EE v. MARTIN, &c.

Filed June 4, 1881—Not to be reported.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Pryor, reversing.

1. Execution levies on and sale of undesignated 500 acres of a tract containing about 800 acres of land passed the title to 500 acres only to the purchaser.

In this case one execution was levied on 400 acres and another on 500 acres of the tract containing about 800 acres, without showing what particular land was intended to be levied on or sold. In such a case it will not be presumed, nor will proof be admitted to show, that the levy was on the entire tract. The 500 acres is directed to be laid off to the purchaser at such execution sale, including the residence, in such a manner as will be just to all the parties, and the remainder is directed to be disposed of by the assignee of the owner for the benefit of his creditors.

2. Personal property purchased with the wife's money in possession of the husband is subject to be levied on to satisfy executions against him.

H. T. Clark for appellant.

Halsell & Mitchell for appellees.

KNOCK, &c. v. TRIBER, &c.

Filed June 11, 1881—Not to be reported.

Appeal from Campbell Chancery Court.

Opinion of the court by Judge Pryor, affirming.

1. Purchase money for land was in this case properly applied as credits on purchase notes.

2. The holder of the legal title must be a party to proceedings to sell land—A judgment upon a petition for the sale of land, the title of which was in the wife, who was not before the court, was a nullity, but a second petition praying for the sale of the property, setting forth these facts and making all the parties in interest defendants, was good.

E. W. Hawkins for appellants.

F. M. Webster for appellees.

BARBEE v. NORTHERN BANK OF KENTUCKY.

Filed June 11, 1881—Not to be reported.

Appeal from Bourbon Circuit Court.

Opinion of the court by Judge Hines, affirming.

In the reformation of deeds the rights and equities of innocent third parties are not to be disturbed. The loss, if any in such cases, should fall upon those through whose negligence such rights and equities are permitted to intervene.

Cunningham & Turney for appellant.

Prall & Dickson for appellee.

MILLER v. WITHERS.

Filed June 11, 1881—Not to be reported.

Appeal from Grayson Circuit Court.

Opinion of the court by Judge Hines, affirming.

1. Where an amended answer was not tendered until a year after the filing of the original answer, and no reason stated why it was not offered sooner,

and there was nothing upon the face of the amendment to indicate that all the facts therein stated were not in the knowledge of the pleader when the original answer was filed, the court below did not abuse a sound discretion in refusing to allow the amendment to be filed.

2. Possessory title is required to be accepted by the vendee under the pleadings in this case—The court say: "The original answer does not point out any specific defect in the title except the incumbrance in favor of Smith which was subsequently removed, nor does it allege that appellee had no title, and as the evidence tends to show an acceptance of a deed of general warranty, and as there has been no eviction, and as there is no adverse claimant, appellant can not complain, but must accept the possessory title tendered."

J. S. Wortham for appellant.

Conklin & McBeath for appellee.

BERRY v. BALLARD'S EX'OR.

Filed June 14, 1881—Not to be reported.

Appeal from Oldham Circuit Court.

Opinion of the court by Judge Pryor, reversing.

In an action against a decedent's estate for the value of services performed the recovery was authorized in this case by the uncontradicted testimony of at least one witness produced to establish the rendition and the value of the services.

Caldwell & Harwood for appellant.

Carroll & Barbour and J. Clore for appellee.

BARKER v. BARKER.

Filed June 14, 1881—Not to be reported.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Pryor, reversing.

In the petition of a married woman praying for power to trade as a feme sole, if the husband does not unite with her, he should be made a party defendant and served with process.

Stone & May for appellant.

Morrow & Newell for appellee.

MAUPIN'S ADM'R v. PACE, &c.

Filed June 16, 1881—Not to be reported.

Appeal from Barren Circuit Court.

Opinion of the court by Judge Pryor, affirming.

1. A power of attorney to convey a married woman's land is held to be defective because it was acknowledged by her and her husband in the State of Louisiana before, and certified in the name of, a deputy clerk.

2. The certificate of acknowledgment was also defective in not stating that the contents were explained to the feme by the officer when taking her acknowledgment.

Lewis & Porter for appellant.

L. McQuown, Hord & Trabue and P. H. Leslie for appellees.

BROWINSKI v. PHELPS.

Filed June 21, 1881—Not to be reported.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor, affirming.

1. The failure to appoint a guardian ad litem for infant defendants, and the fact that no answer was filed in their behalf, where the estate of the infants' decedent, under a decree of the chancellor, was sold to pay debts, did not affect the title of a purchaser where the purchase had been confirmed by the chancellor.

2. In the absence of fraud or bad faith the Court of Appeals will not inquire into the necessity of the sale.

John Mason Brown for appellant.

Zack Phelps and Goodloe, Roberts & Humphrey for appellees.

TYE v. COMMONWEALTH.

Filed June 21, 1881—Not to be reported.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Hargis, affirming.

1. A defendant is not in legal jeopardy until the jury has been empanelled and sworn.

2. Conflicting statements—Before evidence, that a witness has made at another time a different statement, can be offered the witness must be examined concerning the matters sought to be proved. (Civil Code, section 598.)

3. *Res gestæ*—The examining trial and statements made several days after the alleged commission of the offense did not in this case constitute any part of the *res gestæ*.

4. Former attempts of accused to commit same offense—It was proper to allow the Commonwealth to prove the number of attempts by the defendant to commit the same offense for the purpose of establishing the alleged identity of the accused.

C. W. Lester for appellant.

P. W. Hardin for appellee.

RECENT PUBLICATIONS.

Moak's Underhill on Torts, published by William Gould & Son, Albany, N. Y., is before us. In reducing the law in reference to torts to rules the author of this valuable book has performed a work no less marvelous than useful to the profession generally. The rules and subrules express in a clear, perspicuous and authentic manner the result of the settled adjudications of the courts of England and of the American States up to the present time, on almost every possible phase of the law of torts. Each rule and subrule is sustained and illustrated by a citation of the authorities, from which it is deduced, in such manner as to leave no doubt that the rule is correctly stated and well sustained, both by reason and authority. This work will be to the practicing lawyer what a labor saving machine is to the mechanic or agriculturist, as it will enable him to ascertain what the law is in reference to almost any character of tort in the least possible time, and with the least possible labor.

PRESIDENT GARFIELD.

The attempted assassination of President Garfield by Charles J. Guiteau on the 2d instant was a murderous assault upon our government and upon the hopes and peace of every man, woman and child in it, except the would be assassin himself. If there are fifty or a hundred thousand men in the United States now wishing that the president may not recover we are free to say that, in our opinion, it would have been much better for the people of the United States that that fifty or hundred thousand men had perished by some sudden calamity than that such an attempt should have been made upon the life of the president, even if he should recover and suffer no permanent injury from his wounds. The prayers of all good men are for the president and his speedy and permanent recovery. We are gratified that the governor of this State has manifested his deep and heartfelt interest and sympathy, as well as that of all the good people of this Commonwealth, by issuing his proclamation, proclaiming Thursday, the 14th day of July instant, as a day of public fasting and prayer in behalf of the president; "that the life of the said James A. Garfield, president of the United States, may be vouchsafed to us; that he may be restored to his country, family and friends, long to live; and that in the future our country may be preserved from the repetition of similar atrocities." The lessons derivable from the assault of Guiteau upon the life of the president are, that there is too much political asperity in this country, and that too many men look to the government for employment. These are evils which can only be averted by such a reform in our civil service as will materially and permanently reduce the number of public officers to a small per cent. of the present aggregate.

THE KENTUCKY LAW REPORTER.

AUGUST, 1881.

THE RIGHT OF A THIRD PERSON TO SUE ON A CONTRACT MADE IN HIS FAVOR.

[From the American Law Review—Printed by permission.]

One of the essential rights of a member of any society is the legal power to acquire new rights through contract, and one of the essential obligations of a member of any society is the duty to perform whatever he has competently promised.

In the development of this power of acquiring rights through contract, three chief stages are to be noticed:

First. That stage of development where it is competent for an individual to acquire contract rights only through his own act.

Secondly. That stage where he can also acquire such rights through the act of another, that other being his agent; and,

Thirdly. That stage where he can in addition acquire such rights through the act of another, that other not being his agent, this last extension of the legal competency of the individual being the subject of much controversy to-day. The proper controversy, however, is not whether this last stage of development will ever be reached, for to assert the negative of this would be assuming the gift of prophecy in no small degree, but rather whether the legal mind of the present generation has attained the capacity to conceive of a proper theory upon which to base and apply this extension of the power to acquire contract rights. In other words, is it law to-day because we can think it and fit it in with the rest of our legal system?

Regarding the same question in a somewhat different light, it may be put thus: The development of law corresponds ap-

proximately at any given time to the needs of the society which it regulates. The first and second stages in the development of this power to acquire contract rights were called forth by the advancing needs of society. Do the needs of the society in which we move call for such an extension of this power as to enable a third person to sue on a contract made for his benefit by a party not his agent? Is this power law because of its necessity?

In the common law, growing up as it did under the influence of the fully developed Roman law, the idea of agency seems always to have been present. On the other hand, in the earlier periods of the Roman law agency was unknown, and never, even in the time of Justinian, was agency recognized as a principle of law; but the instances where it was allowed were always regarded as exceptions to a general rule, though in Justinian's time the exceptions were of more practical importance than the rule itself.

With stringency also was representation in court excluded by the early forms of Roman procedure, which, through its narrowness and inflexibility, retarded the growing facility of acquiring contract rights, as indeed the development of a system of law is generally impeded at first by the strictness of its forms of procedure, and their inadequacy to the enforcement of any but the simplest rights without great circuitry of action.

The Roman law never fully attained the second stage in the development of the power to acquire contract rights. With regard to that stage it held the same position which our law holds with regard to the third. The Roman law said: "You can acquire contract rights through your own act; you can not acquire them through the act of another, except in certain cases and under certain circumstances." Our law says: "You can acquire contract rights through your own act, or through the act of your agent; you can not acquire them through the act of another who is not your agent, except in certain cases and under certain circumstances."

The still questionable right of a third person to sue on a contract made in his favor can be discussed to the best advantage by treating it, first, historically and with reference to au-

thority; and, secondly, without reference to authority, having regard only to its theoretical admissibility.

As a legal principle this right has never been recognized by any system of law. At Rome, in certain exceptional cases, rights could be acquired through the act of a person not an agent, just as in certain exceptional cases rights could be acquired through the act of an agent; and in fact the Roman lawyers, never having clearly conceived the principle of agency, failed to distinguish between acquiring a right through the act of an agent and acquiring a right through the act of a person not an agent. Yet while the nations of Europe, who have based their laws on the Roman law, have developed and brought into clear light the principle of agency, they have at the same time distinguished that principle from the acquiring of rights through the act of a party not an agent, and still refuse to recognize theoretically rights so acquired. (a)

It is improbable that the right of a third person to sue on a contract made in his favor existed in the older common law. Before the Statute of Monasteries, (b) the assignee of a reversion could not sue on covenants or conditions made by his assignor with the holder of the present estate, although so-called privity of estate existed between such holder and the assignee. A chose in action, moreover, was not assignable at common law, though a use might be declared in favor of a person not a party to the deed by which it was created, but this last was equity and not law. The chancellor compelled the carrying out of such a trust just as the Roman praetor had compelled the performance of the *Fidei Commissae*, the ancestors of trust.

The cases in the English reports on the right of a third person to sue on a contract made in his favor are interesting, not that they are consistent or show a steady course of development reaching finally some points worth reaching, but as showing a tendency, however, which has not proved strong enough to overcome the conservatism of the English bench.

(a) For German law, see Windscheid *Pandekten*, 2, section 316 and note 13. For French law, see Pothier, *de l'Obligation*, 1, page 72.

(b) 32 Henry VIII, c. 34.

One of the first cases bearing on the subject is *Whorewood v. Shaw*,^(a) decided in the Queen's Bench in 1603. The action was brought "in debt by Shaw, executor of A, against Whorewood, administrator of Field, upon a bill of debt made by Field to A, whereby Field acknowledged to have received of one Prettie £40, to be equally divided between A and B and to their use." Held—"That though no contract is between the parties, yet when money or goods are delivered upon consideration to the use of A, A may have debt for them."

The next case, decided nearly seventy years later, is one of the best known cases in the law, *Dutton v. Pool*.^(b) The plaintiff declared in assumpsit "that his wife's father, being seized of certain lands now descended to defendant, and being [about to cut £1,000 of timber from said lands to raise a portion for his said daughter, the defendant promised, in consideration that he would forbear to fell the timber, that he would pay the said daughter £1,000." The court held the action lay, saying: "It might have been another case if the money had been to have been paid to a stranger; but there is such a nearness of relation between the father and child, and 'tis a kind of debt to the child to be provided for, that the plaintiff is plainly concerned."

In England it has often been decided that any extension of the doctrine of *Dutton v. Pool* is not to be countenanced, and the case itself has been finally overruled.^(c) Still *Dutton v. Pool* has exerted great influence, having done much to establish the right of a son to sue on a promise for his benefit made to his father.^(d) It is clear from the language of the court that they did not consider the case as establishing any very general principle, and they seem to have found a compensation for the absence of "privity of contract" in the near relationship between the interested parties. Apparently a vague idea lurked obscurely in the minds of the judges that, in order to give the

^(a) Yelv. 25. A good many of the older cases are cited in 1 Viner's Abridgment, 333-337, and in Comyn's Digest under the head of Assumpsit.

^(b) 1 Ventris, 318.

^(c) See *Tweedle v. Atkinson*, *infra*.

^(d) e. g. in Massachusetts, see *Mellen v. Whipple*, *infra*.

person to be benefited by the promise a right to sue, there must exist some duty between that person and the promisee. (a)

About fifty years after *Dutton v. Pool*, *Crow v. Rogers* (b) was decided, a case which is undoubtedly law in England to-day. "In assumpsit the plaintiff declares that, whereas, one John Hardy was indebted to plaintiff £70, upon a discourse had between Hardy and defendant, it was agreed that defendant should pay plaintiff's debt of £70, and that Hardy should make defendant a title to a house. Averment that Hardy was ready to perform." The court gave judgment for the defendant, holding the plaintiff a stranger to the consideration.

As well as can be made out from the meagreness of the report this case decides the general principle that a stranger to the consideration can not sue, even where the contract is plainly in his favor. It is not clear, however, that it was the intention of the parties to the promise that Crow should have a right to sue, and the main reason on the part of Hardy for making the contract was to free himself from a debt due from himself to Crow, rather than to confer a benefit on the latter. (c)

Coming down to times comparatively recent, an important case is *Price v. Easton*, (d) decided in the King's Bench in 1838 on the authority of *Crow v. Rogers*. There the declaration

(a) This idea has appeared again after a couple of centuries in *Vrooman v. Turner*, 69 N. Y., 280, *infra*. In the same volume of *Ventris* with *Dutton v. Pool*, there is reported a case rather against any general right of a third person to sue on a contract made for his benefit: but a case is there cited where it was held that a daughter of a physician might maintain assumpsit upon a promise to her father to give her a sum of money if her father performed a certain cure. *Bourne v. Mason*, 1 *Ventris*, 6. See also *Style*, 206.

(b) 1 *Strange*, 502, decided about 1724.

(c) At the time of its decision *Crow v. Rogers* was of by no means undisputed authority. Lord Holt had decided previously, in accordance with *Whorewood v. Shaw*, *supra*, that *indebitatus assumpsit* would lie for moneys had and received from a third person to the use of plaintiff. 2 Lord Raymond, 1228, with which decision of

Lord Holt *Crow v. Rogers* does not accord, though in the latter case there was no money actually received to the use of the plaintiff, and no averment of performance was made, but only of readiness to perform; and some years after *Crow v. Rogers* there appears a dictum of Lord Mansfield, approving *Dutton v. Pool*, *Cowper*, 443. Moreover Judge Buller says, in 1 *Boss. & Pul.*, 101, note c.: "Independent of the rules which prevail in mercantile transactions, if one person makes a promise to another for the benefit of a third, that third person may maintain an action upon it." To these dicta it may be said that Lord Mansfield was occasionally equity speaking through the mouth of common law, and the inspirations of Lord Mansfield were the words of Buller. Still as late as 1823, *Dutton v. Pool* was approved in the King's Bench, 2 *Dowling & Ryland*, 277.

(d) 4 *Barn. & Ad.* 433.

stated that W. P. owed the plaintiff £18, and in consideration thereof, and that W. P. at defendant's request had promised to work for him at a certain rate of wages; and also in consideration of W. P.'s leaving the amount which might be earned by him with defendant, he, the defendant, undertook to pay the plaintiff said £18. Averment that W. P. performed his part of the agreement. Judgment was arrested on the ground that plaintiff was a stranger to the consideration.(a)

Peddie v. Brown,(b) decided in 1857 in the House of Lords, enunciates the broad principle that the third person can not sue unless he is named in a contract evidently intended for his benefit. That under such circumstances he could sue the court was not called on to decide, and the negative of this proposition is held by *Tweddle v. Atkinson*.(c)

The facts of this carefully considered case were as follows: Plaintiff was the son of John Tweddle, deceased, and before the making of the (written) agreement, hereafter mentioned, married the daughter of William Guy, also deceased, at the time when the suit was brought. Before making the written agreement John Tweddle promised plaintiff to give him, and Guy promised plaintiff to give his (Guy's) daughter, a marriage portion, both of which promises were verbal, made in consideration of the intended marriage, and neither of them had been performed at the time when the written agreement was made. The declaration then alleged that after the marriage said Guy and said Tweddle entered into the following agreement in writing, viz:

"July 11, 1855.

"Mem. of agreement made this day between William Guy, of the one part, and John Tweddle of the other part. Whereas, it is mutually agreed that the said William Guy shall and will pay the sum of £200 to William Tweddle, his son-in-law, and the said John Tweddle, father to aforesaid William,

(a) *Lilly v. Hays*, 5 Ad. & Ellis, 548, does not accord with *Price v. Easton*, but see 3 B. & Ad., 354, 4 Ib., 611, and 5 Ib., 504. In *Burn v. Carvalho*, 4 Mylne & Craig, 690, it is said: "In equity an order given by a debtor to his creditor, upon a third person having funds of the debtor, to pay the creditor out of such funds, is a binding equitable assignment of so much of the fund." But this is equity, and *Barron Parke* says, in 1 Exch., 456: "It is true that no stranger to the

consideration can sue." Still the real consideration, i. e., the act performed, or to be performed, by the promisee, need not move to, that is, inure to, the benefit of the promisor, to enable the promisee to sue on the promise—instance, the case of a guarantors' promise. Why then need it move from the plaintiff?

(b) 3 Jurist, N. S., 895.

(c) 1 Best & Smith, 393, Queen's Bench, 1861.

shall and will pay £100 to said William, each and severally the said sums, on or before August 21, 1855. And it is further agreed by the aforesaid William Guy and John Tweddle that said William (Tweddle) has full power to sue the said parties in any court of law and equity for the aforesaid sums hereby promised and specified."

Plaintiff afterwards assented. Held—That the action would not lie, Wightman, J., saying: "It is now established that no stranger to the consideration can take advantage of a contract, although made for his benefit;" to which Crompton, J., added: "Modern cases show that the consideration must move from the party entitled to sue upon the contract. * * * It would be a monstrous proposition to say that a person was a party to the contract for the purpose of suing upon it for his own advantage, and not a party to it for the purpose of being sued." (a)

Of course in this case plaintiff could have sued on the verbal promises, which were made before his marriage, had it not been for the statute of frauds. Otherwise, the case is as strong as possible against the right of a third person to sue under any circumstances. Here all the persons interested were near relatives, so the case overrules *Dutton v. Pool*, and the intention of the contracting parties, that it should be competent for plaintiff to sue, was plainly stated. According to this case it would seem that under no circumstances is it competent for a person to render himself liable to be sued by another in contract, except by contracting with that other or his privies.

Turning now to our own country, it will appear that in a majority of the States a right to sue on a contract made in favor of a third person is admitted to exist, especially where

(a) In *McCombray v. Thompson*, 16 against C the summons and plaint Weekly Rep., 367, decided in the Irish set forth this agreement, averring as Common Pleas in 1868, the facts were a breach that C had not paid B a moiety of the £196. Held—On demurrer, of the one part, and B and C, of the that being a stranger to the consideration B could not sue on the contract (notwithstanding that he was a party thereto.) The case is extreme, but C certain property valued at £196, C promised to pay B a moiety of said sum. In the action brought by B kinson.

the third person is expressly referred to in the contract. (a) Still there is great conflict of authorities, and the courts in some of the States, as, for instance, in Massachusetts, have decided adversely to such right. In considering the American cases it will suffice, first, to point out briefly the general current of opinion in the greater number of the States; secondly, to consider a few of the Massachusetts cases, the State which, of those States that have decided against the right in question, has given the subject the most careful thought; and, thirdly, to review the cases in New York, the State which has treated the subject most thoroughly of those States which have decided in favor of the right.

According to the current of decisions in the following States the right of a third person to sue on a contract made in his favor does not seem to be admitted at present in their courts: Massachusetts, (b) New Hampshire, (c) Vermont, (d) Connecticut, (e) Maryland, (f) Michigan, (g) California; (h) while in the following States the right seems to be allowed: Maine, (i) New York, (j) New Jersey, (k) Pennsylvania, (l) Kentucky, (m) Louisiana, (n) South Carolina, (o) Wisconsin, (p) Minnesota, (q) Indiana, (r) Illinois, (s) Iowa, (t) Missouri, (u) and the United States Supreme Court. (v)

The following are some of the views held by the various courts:

(a) "The right of a party to maintain assumpsit on a promise not under seal, made to another for his benefit, although much controverted, is now the prevailing rule in this country. Judge Davis, in *Hendrick v. Lindsay*, 93 U. S., 143. It is the opinion of the writer that an exhaustive examination of authorities would show that, while most of the Central and Western States recognize such right, the New England States, adhering rather to the stricter principles of the common law, deny it.

(b) 107 Mass., 39.

(c) 15 N. H., 129.

(d) 1 D. Chip., 366.

(e) 31 Conn., 25; contra, 7 Conn., 342.

(f) 1 Har. & G., 484, *semble*.

(g) 10 Mich., 426.

(h) 18 Cal., 80.

(i) 42 Maine, 93.

(j) 20 New York, 258.

(k) 36 N. J. L., 141 (as to written promise).

(l) 85 Pa. St., 235; contra, 3 Pa. St., 330.

(m) 3 Met. (Ky.), 148.

(n) 16 La. Ann., 338.

(o) Strobb., 196.

(p) 43 Wis., 319. 10 Ib., 251.

(q) 28 Minn., 314.

(r) 30 Ind., 112; 20 Ib., 163; 19 Ib., 40; 18 Ib., 114; 18 Ib., 40.

(s) 85 Ill., 279; 64 Ib., 458; 91 Ib., 194; contra, as to contracts under seal, 64 Ib., 162.

(t) 14 Iowa, 68.

(u) 44 Mo., 323; *semble* contra, 12 Ib., 408, and 31 Ib., 466.

(v) 93 U. S., 143, Pet. Circ. Court, 169.

Some of the cases given as the latest decisions may have been since overruled, as the law on the subject is very fluctuating.

Where A has paid money of B to C, and C has promised A to pay it to B, the law creates a privity between B and C, and B may sue C. (a)

A promise to A to pay B, who is absent, is in legal effect a promise to B, and may be so stated in pleading. And a promise to A to indemnify A and B, the latter being absent, if they will do a certain act, is a promise to both A and B. (b)

"A third party may maintain an action in his own name upon a contract made expressly for his benefit, when his release would be a sufficient discharge to the promisor; but not when it would leave the promisor liable to an action by the other contracting party." (c)

"A promise by one to another to pay the indebtedness of the latter to a third person may be enforced in equity by such third person, though he was not a party to the agreement, and after the acceptance of such promise by the creditor he may maintain an action at law thereon. Until such acceptance the parties to the agreement may rescind it." (d)

"It is the settled law in Wisconsin that when one person for a valuable consideration engages with another, whether by simple contract or by covenant under seal, to do some act for the benefit of a third person, the latter may maintain an action against the promisor for breach of the engagement. After knowledge of and assent to such agreement by the person for whose benefit it is made, his right of action on it can not be affected by a rescission of the agreement by the immediate parties thereto." (e)

Like the English cases, the cases in Massachusetts, after no small amount of vacillation, have for the present decided against the right of a third person to sue on a contract made in his favor, although, unlike the law in England, the law in Massachusetts allows a few exceptions to this rule.

An early Massachusetts case is that of *Fulton v. Dickens*, (f) if decided in 1818. There a father placed his infant son in the service of a master, it being agreed between the father and the

(a) 14 Iowa, 63.

(b) *Lucas v. Chamberlain*, 8 B. Mon. (Ky.), 276.

(c) *Kountz v. Holthouse*, 85 Pa. St., 235.

(d) 80 Ind., 112.

(e) *Bassett v. Hughes*, 43 Wis., 319; as to right of parties to rescind, see *infra*.

(f) 10 Mass., 287; see also 15 Mass., 286.

master, among other things, that at the end of the term of service the master should pay the son a certain sum of money. The court held the son could sue, saying: "It is clear that the father had the son's advantage in view."

This case was followed in 1821 by *Arnold v. Lyman*, (a) holding that where a debtor of B conveys property to C, who, in consideration thereof, engages in writing to pay B, B can bring *assumpsit*.

The apparent tendency of the early Massachusetts law towards recognizing the right of the third person to sue received a check in the case of *Mellen v. Whipple*, (b) decided in 1854, where the action was brought by the mortgagee on a promise made to the vendor of the equity of redemption by the purchaser of the same, to assume and cancel the mortgage on the premises, together with the note, for which, as collateral, the mortgage had been given. Held—That the action did not lie. Judge Metcalfe admitted, however, that to the general rule against the right of a third person to sue on a contract made in his favor there were three exceptions: First, *indebitatus assumpsit* for money had and received in certain cases; second, where the promise is made to a father for the benefit of the child; and, third, a certain case where a promise to lessee accrued to lessor. These three exceptions were the dicta. (c)

The present law in Massachusetts may be considered settled by the case of *The Exchange Bank v. Rice*, (d) where Judge Gray states the rule thus: "The general rule of law is that a person who is not a party to a simple contract, and from whom no consideration moves, can not sue on the contract; and consequently that a promise made by one person to another for the benefit of a third person will not support an action by the latter. And the recent decisions in this Commonwealth and in England have tended to uphold the rule and narrow the exceptions to it."

In the New York courts the question has come up many times for decision under different aspects, and these courts

(a) 17 Mass., 400.

(b) 1 Gray, 317.

(c) They seem to have been founded on the case of *Carnige v. Morrison*, 2

Met., 381, where a discussion of the subject may be found.

(d) 107 Mass., 39 (1871).

have made most persistent efforts to find some theory upon which to base the decisions which they have rendered in favor of the right of the third person to sue. Perhaps the conclusion of anyone who may read the following review of the New York cases will be that the New York courts have been, and still are, groping towards the light.

About the earliest case on the subject is *Schemerhorn v. Vanderheyden*, (a) decided in 1806, where the court held, citing *Dutton v. Pool*, "that where a person makes a promise to another for the benefit of a third person, that third person may maintain an action on such promise." (b)

This case and others seem to have established the law, so that in *Delaware & Hudson Canal Co. v. The Westchester County Bank*, (c) the court used the following language: "We consider it now well settled as a general rule that, in cases of simple contracts, the person for whose benefit the promise is made may maintain an action in his own name upon it, although the consideration does not move from him."

Apparently the first attempt to base the decisions upon any tangible theory was made in the case of *Lawrence v. Fox*. (d) The decision in this case is law to-day, and is likely to remain so, because it accords with the majority of the New York cases (e) on the subject, and, what is more, because it is an expression of a widespread tendency in American law to allow abundant freedom in the acquisition of contract rights. On the other hand, hardly any one agrees with the reasoning and dicta of the court, which can be regarded at best but as unsatisfactory, though well meant, attempts to base upon principle what judges felt must be recognized as law.

The facts of the case were briefly these: A promise, for a valuable consideration, was made to one Holly to discharge his debt to the plaintiff, the latter not being privy to the contract. Held—That the action would lie, Judge Gray, who delivered the opinion in the case, remarking: "Suppose defendant had

(a) 1 Johns, 140; see *Barker v. Buck*, 412; *Farley v. Cleveland*, 4 [Cowen, 432; and See 5 Wend., 235].

(b) That such promises, when the promisor receives value, are not within the Statute of Frauds is decided by *Gold v. Phillips*, 10 Johns, 575; 42 N. Y., 316; *Id.*, 399.

(c) 4 Denio, 87 (1847).

(d) 20 N. Y., 208 (1859).

(e) Accord., 3 Keyes, 525; 37 N. Y.,

given his note, in which, for value received of Holly, he had promised to pay plaintiff, and plaintiff had accepted the promise, retaining Holly's liability—very clearly Holly could not have discharged that promise, be the right to release the defendant as it may." Likely enough, in this supposed case, the party from whom the consideration moved could not have discharged the promisor; still even this is not such "very clear" law that a brief explanation on the part of the learned judge would have been out of place.

Judges Comstock and Grover dissented from the decision, and Judges Johnson and Denio were of opinion that the promise should be regarded as made to the plaintiff through the medium of his agent, whose action he could ratify when it came to his knowledge. This last proposition, to regard the promisee as the agent of the third person, would settle everything, were it not infected with the fatal failing of being contrary to the facts of the case. If the idea of agency has any definite meaning in our law it is plain that such cases as this are not cases of agency, and this proposition of the judges is nothing more than a proposal to introduce a legal fiction.

Shortly after *Lawrence v. Fox* the interesting case of *Hartley v. Harrison*(a) was decided. There land was conveyed subject to a usurious mortgage, which the grantee assumed to pay. Subsequently the grantor and grantee attempted to release each other from their respective covenants so as to make the conveyance between them operate as a mere bargain and sale deed. On an action being brought to foreclose, the opinion of the court was as follows:

"The rule is a familiar one, that when the owner of land mortgages it to secure the payment of a debt, and afterwards sells and conveys the equity of redemption subject to the lien of the mortgage, and the purchaser assumes the payment of the mortgage as a portion of the purchase money, the latter becomes personally liable for the payment of the debt of the former to the holder of the mortgage.

"The law is well settled in this State that the purchaser who takes a conveyance of the premises from the mortgagor can not set up the defense of usury against such mortgagee, and thus obtain an interest in the land which the mortgagor never agreed or intended to transfer to him (8 Paige, 641; 9 Ib., 145; 10 Ib., 591). The principle upon which these proceed is, that

(a) 24 N. Y., 170.

the mortgagor may waive the usury and elect to affirm the mortgage by selling and conveying his property, subject to the lien and payment of such mortgage; and the purchaser in that case takes the equity of redemption merely, and can not question the validity of the mortgage on the ground of usury. It follows, therefore, that the grantee can not set up the defense of usury unless the release of the grantor to him of the covenants and agreements contained in the deed to him, executed after the issues in this cause were joined, shall be held to have the effect to discharge him from his liability, and authorize him to assert this defense. Now this release can not have any such effect; the grantor could not upon any principle release the grantee from the liability he was under to the plaintiff, in consequence of his taking a conveyance of the premises, subject to the payment of this mortgage. His liability to the plaintiff was fixed the moment he received the conveyance, and it was not in the power of the grantor to release him from it, and this land in his hands became the primary fund for the payment, and neither he himself nor the grantor, so far as regards the plaintiff's rights, could discharge him from it or release the land from the lien of the mortgage. This liability, when once created, was irrevocable, and neither the grantor nor the grantee could avoid it. (7 Paige, 615, 689, 640, 641; 5 Selden, 83.)

Comstock, C. J., dissented. (a)

This decision can only be upheld on the broad principle that when the contract in favor of a third person has been made, and the third person has begun to act on it, from that moment no acts of the original parties can destroy his right of action.

Some time after the decision of the case of *Lawrence v. Fox* the courts seem to have arrived at the conclusion that its application had been extended too broadly, and the decision itself was unfavorably spoken of. In this respect *Garnsey v. Rogers*, (b) is worthy of notice, where it was decided that a covenant in a mortgage, whereby the mortgagee assumed to pay a prior mortgage on the premises, does not impose on the mortgagee such personal liability for the prior mortgage debt as can be enforced against him by the prior mortgagee. Judge Rapallo said:

"I do not understand that the case of *Lawrence v. Fox* has gone so far as to hold that every promise made by one person to another, from the performance of which a third would derive a benefit, gives a right of action to such third party, he being neither privy to the contract nor the consideration. To entitle him to an action the contract must have been made for his benefit. He must be the person intended to be benefited; and all that the case of *Lawrence v. Fox* decides is, that where one person loans money to another upon his promise to pay it to a third person, to whom the party so lending

(a) Under very similar circumstances in *grantee from the covenant to assume a case in the Supreme Court it was decided that the grantor could release his* (b) 47 N. Y., 233.

the money is indebted, the contract thus made by the lender is made for the benefit of his creditor, and the latter can maintain an action upon it without proving an express promise to him from the party receiving the money." (a)

According to these dicta the right to sue inures to the third person when it is intended that he should be benefited by the contract.

The latest discussion of the question is to be found in *Vrooman v. Turner*, (b) decided only three years ago. The facts of this case were as follows: One E, the owner of certain premises, having mortgaged them, conveyed them to M. Through various mesne conveyances, in none of which was the payment of the mortgage assumed, the title came to S., who conveyed the premises to the defendant by a deed, in which the latter covenanted to pay the mortgage. The Supreme Court having given judgment for the deficiency against the defendant in favor of the mortgagee, an appeal was taken to the Court of Appeals. The following is an extract from the judgment of the latter court:

"To give a third party who may derive a benefit from the performance of the promise an action there must be, first, an intent by the promisee to secure some benefit to the third party; and, second, some privity between the two, the promisee and the party to be benefited, and some obligation or duty (b) owing from the former to the latter which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally.

"It is true there need be no privity between the promisor and the party claiming the benefit of the undertaking, neither is it necessary that the latter should be privy to the consideration of the promise, but it does not follow that a mere volunteer can avail himself of it. A legal obligation or duty of the promisee to him will so connect him with the transaction as to be a substitute for any privity with the promisor, or the consideration of the promise, the obligation of the promisee furnishing an evidence of the intent of the latter to benefit him, and creating a privity by substitution with the promisor. A mere stranger can not intervene and claim by action the benefit of a contract between other parties. There must be either a new

(a) *Burr v. Beers*, 24 N. Y., 172, distinguished. Accord., *Merrill v. Green*, 55 N. Y., 270, and *Simpson v. Brown*, 38 N. Y., 355.

(b) 69 N. Y., 280. "An assumption clause in a deed can only be enforced by a lie, nor where in equity the debt of the grantor, secured by the lien, becomes by the agreement between him and his grantee, who assumes the payment, the debt of the latter."

(*Pardee v. Treat*, N. Y. Weekly Digest, Dec. 24, 1880.)

(c) In *Thorpe v. Keokuk Canal Co.*, 48 N. Y., 253, defendant took a deed of certain premises subject to a mortgage, which he covenanted to pay. The bond accompanying the mortgage contained a provision that, in case of default, recourse should first be had to the mortgaged premises, and that the obligor should be answerable only

consideration or some prior right or claim against one of the contracting parties, by which he has a legal interest in the performance of the agreement; there must be a legal right founded upon some obligation of the promisee in the third party to adopt and claim the promise as made for his benefit."

Held—That the action would not lie against defendant.

Just as in the two cases immediately preceding it, *Vrooman v. Turner* holds that, in order to give to the third person a right of action, it must be the intention of the promisee to benefit him; but in the opinion in *Vrooman v. Turner* this right of the third person to sue is still further restricted: "There must be some obligation or duty owing him from the promisee." As a matter of fact, in the majority of such contracts some such duty or obligation would be present, but why is it necessary to the right of the third person to sue? The reasoning of the court seems as follows: "No mere 'volunteer' [?] can take advantage of the contract; there must be a legal obligation between the third person and the promisee, which will so connect the former with the transaction as to be a substitute for any privity with the promisor, or the consideration of the promise, the obligation of the promisee furnishing evidence of the intent of the latter to benefit the third person, and creating a privity by substitution with the promisor." With regard to all of which it may be said, that of all ambiguous and empty terms in the law, the term "privity" has the most various and numerous meanings; in other words, is the one which comes the nearest to having no meaning at all except that which may be drawn from the context. "Privity" is a mystery which no one need hope to unravel this side of the grave, and there is a new appearance of the legal Proteus, privity by substitution; for instance, A is indebted to B, and in consideration of a release from B promises to pay off B's creditor, C. So, by substitution, a privity is created between

for a deficiency. **Held**—That the mortgagee could maintain an action against defendant without first foreclosing the mortgage, and could recover from defendant the whole amount unpaid. According to this decision it seems a covenantor can impose a liability on himself in regard to the third person different from the liability or duty existing between that third person and the covenantee; and if one holds that the duty exist-

ing between the third person and the covenantee need not be the same as the liability which the covenantor imposes on himself, one is not far from holding that no duty need exist between the third person and the covenantee. Still it must be admitted that in *Thorp v. The Canal Co.* the two obligations were in so far the same that performance on the part of the covenantor would have freed the covenantee from his liability to the holder of the mortgage.

A and C, a privity to which C is not privy! "Privity by substitution" can be nothing more—to adopt another phrase in the same opinion—than a "substitute for privity," i. e., something else.

Any careful student of legal history must have noticed two prominent tendencies in the growth of any system of law; the first a tendency to carry out the intention of contracting parties and enlarge the scope of legal competency; the second, a tendency to avoid a circuity of action in so doing. These two tendencies appear because the law continually strives to keep up with the requirements of society. Accordingly, for example, the law has striven to enforce the rights of a third person against him who has made a promise for such third person's benefit. Sometimes the law has given up the task, saying: "There is no privity, the suit is a legal impossibility;" sometimes it has more or less intelligently enforced these rights, but has hitherto failed satisfactorily to answer the question, how is it possible logically and consistently to enforce this questionable right of a third person to sue on a contract made for his benefit, where the consideration moves neither from him nor from his representative?

Possibly the solution has hitherto been overlooked on account of its simplicity. What is the general nature of the obligation into which a party enters in making a valid contract? A contracting party is supposed to know the law, and to know that a legal sanction is attached to every promise for a consideration, not in itself impossible to perform nor against good morals or public policy. Such a party, therefore, in contracting is conclusively presumed to assent to this sanction, which is to be enforced, if necessary, by means of an action. Thus the obligation into which a contracting party enters may be regarded as an obligation in the alternative either to perform or to incur the liability of an action, the object of which shall be to compensate the other party as completely as possible for the nonperformance of the contract.

A, in contracting with B for a valid consideration, binds himself either to perform or be sued. This is the ordinary nature of the obligation on A's part. Now it is undeniably

competent for A to bind himself to B to perform some act for the benefit of a third person C, and A binds himself here in the same alternative to perform or be sued; and, it being competent for A to contract with B in such a manner as to make the performance of the contract relate to C, that is, in such a manner as to make the one alternative of the obligation to which A binds himself relate to C, the law, to be consistent, must allow A to contract with B in such manner that the other alternative of the obligation shall relate to C as well.

The usual contract made by A with B, the consideration moving from the latter, is in favor of B, and consists of the alternative obligation to perform or be sued by B. This is A's intention, express or implied, assented to expressly or impliedly by B. Suppose, now, A contracts with B in favor of C. It may be the intention of the contracting parties that both alternatives shall relate exclusively to C—that is, shall be in his favor, in which case B would have no further rights under the contract; or it may be intended that the one alternative performance shall be in favor of C, and the other alternative right of action, (a) in favor of B, or even of B and C. Although, as in the last instance, the second alternative right of action be in favor of both B and C, it does not follow that there are two rights of action. Just as the first alternative performance is single, so there is in reality but one right of action for the failure of this performance. (b) The question who shall sue depends equally with the question for whose benefit is the contract made, upon the intention of the contracting parties; and although where the intention is to benefit the third person it will also be intended usually that he shall be entitled to sue, yet this is not necessarily so in theory, and hence the ratio decidendi of some of the New York cases is not the correct one.

It may be said that a right of action is an incident attached by the law, and in no way dependent on the will of the parties;

(a) Of course "right of action" denotes here the "liability to be sued," for the benefit of B, or a certain other act for the benefit of C. Here viewed from the standpoint of the obligee, there might be two distinct causes of action for the compensation of different wrongs; the one action, however, excluding the other.

(b) The case might be still further complicated by supposing the promise to be either to perform a certain act

but in the first place, this is not so, for the parties can always agree that no right of action shall attach at all; and, in the second place, it would be foolish in the law to allow certain contracts to be made and yet withhold its sanction—the power to enforce them—from him who often may be the only person whose interest it will be to compel performance.

That in the present state of our commercial society the right of a third person to sue where a contract is made for his benefit is a necessity, it would be hard for anyone to deny. Indeed its necessity is shown in many ways. Business is largely carried on by means of the telegraph. When the sender of the message is not the agent of the receiver the contract is undoubtedly between the telegraph company and the sender. Suppose a message is incorrectly forwarded; who is to sue for the damages resulting? Of course the sender can sue if damages result to him; but it is to the receiver of the message that damages more often result. Now who is to sue? Not the sender, for he has no cause of action, (a) not having been injured; and shall we say the receiver can not sue because the telegraph company never contracted with him? According to this view there would indeed exist a large class of wrongs without a remedy.

It is submitted the proper view is this: The telegraph company contracts with the sender for the benefit of the receiver, as the latter's interest shall appear, to transmit a message, using due care, and in case of negligence and damages resulting therefrom to compensate the receiver if it is to him that the damages result. The contract is one entered into partially for the benefit of a third person, the receiver of the message. (b)

(a) Or at least only a cause of action to recover the trivial sum paid for the message.

(b) This seems a more reasonable view, as well as one which corresponds more closely to the facts of the transaction than that taken in *De Rute v. The Telegraph Co.*, 1 Daly. 547, where Judge Daly says: "The contract for the transmission of a telegraphic message is not necessarily

made with the person by whom, or in whose name, it is sent. He may have no interest in the subject-matter of the message, but the party to whom it is addressed may be the one with whom the contract is made." The fact unfortunately remains that the receiver of the message is not the party with whom the contract is made.

A South Carolina case holds that

Two important though subordinate questions remain for consideration: The first one, construction of the contract; the second, power of the contracting parties to rescind.

As has been already said, the contract is to be construed in accordance with the intention of the contracting parties; on this intention depends the right of the third person to sue. In the usual case of a promise from A to B, it is seldom expressed that B shall have the right to sue in the event of nonperformance on the part of A; this is understood in making the contract. But where a contract is made in favor of a third person, there may be two parties interested in the performance. All is clear if it is expressed in the contract that the promisee, or the third person, or either, may sue in case of a breach. The question arises only where this is not expressed, but left to be determined from the terms and circumstances of the contract.

Undoubtedly, in most cases, it would be intended that the promisee should have the right to sue, whether this right was to extend to the third person or not, though the promisee might in terms preclude himself from exercising this right. Moreover, the presumption would seem to be that it was the intention of the contracting parties that the third person should have the right to sue in cases where the contract was made clearly for his benefit. Sometimes it would be difficult

there is sufficient privity between the receiver and the company to enable the former to sue, even where the sender has paid for the message. But the view only leads to the inquiry, what is privity? (*Aiken v. Tel. Co.*, 5 S. C. 358; *contra* L. R., 2 C. P. D., 62; 16 W. R. Q. B., 219; and see 35 Penn. Stat., 298.)

A dictum of Judge Brady, in *Rose v. Tel. Co.*, 3 Abbott's Pr., N. S. 408, is as follows: "I am not prepared to say that, irrespective of a liability arising purely on contract, a telegraph company may not be liable to a third person for the injurious consequences of a telegraphic message to such third person. If upon the faith of a message thus communicated the receiver enters into contracts, &c., which result in loss to himself, which loss is wholly occasioned by errors in

the message, which errors were negligently made by the telegraph company, it would seem that a liability should attach, not on the ground of a violation of contract, but of the violation of a duty, the faithful performance of which the company had undertaken." There is still a difficulty in this view of the matter. The telegraph company is "under a duty" to transmit with care. Is this a duty towards every one? Suppose some one happens to see an incorrect message lying on the receiver's desk, and, by acting on the faith of it, incurs loss. Would anyone maintain that such a one could sue? If not, then the telegraph company is under some especial duty or liability to the receiver, which can only arise through its contract made with the sender for the benefit of the receiver.

to discover the intention, but this is a difficulty which may occur in any contract.

Suppose the case where there is no such affection to be presumed between the promisee and the third person as would be likely to cause the former to stipulate for the latter. Here, in all probability, the promisee intended to benefit himself. Still if the object of the contract was such that it could not be reached completely and surely without a right of action in the third person, it is fairly presumable that it was the intention of the contracting parties that the third person should possess such right. For instance, A promises B, for a valid consideration, to pay B's debts. Here B's object in making the contract might not be reached unless B's creditors should have the power to sue A. Having that power, they would be less likely to harrass B himself. So here it may be presumed to have been intended that the creditors should be competent to sue.

If, however, it appears that it was not the intention of the contracting parties that the third person should sue, even where he would be the only one benefited by the contract, such right should not be accorded him, except where other elements, say of estoppel, come into play. Suppose the instance of a covenant on the part of a grantee of mortgaged premises to pay the mortgage. If this covenant is put into the deed and goes on record the mortgagee might claim that the grantor was estopped from denying that it was the intention of the contracting parties that the mortgagee should have the right to sue thereon. But this promise might have been made in some other manner than by insertion in the deed, and it might have been expressed that the promise was intended solely for the indemnification of the grantor, and not for the benefit of the mortgagee. Under such circumstances it is submitted the mortgagee could maintain no action. (a)

(a) To hold that a binding promise, from the fulfillment of which a third person will derive some benefit, necessarily gives such third person a right to sue thereon, notwithstanding the clearly expressed intention of the contracting parties to the contrary, would impose a restriction upon freedom in acquiring contract rights almost as great as would result from denying the right of the third person to sue under any circumstances.

Finally, it would seem that, when the intention of the contracting parties as to the exercise of the right of action can not be discovered, the presumption most general in its application, as well as the most equitable, would be that it was intended that every person directly interested in the performance should have a right of action suitable to the enforcement of his interests.

The second and more difficult of the subordinate questions referred to arises in regard to the right of the contracting parties to rescind.

To solve this question the nature of consideration must be kept in view. What is consideration? Benefit received, or risk, trouble, or detriment caused. When A makes a promise to B for the benefit of C, the consideration moving to A from B, this is sufficient to oblige A to perform, and, if so intended, to give a right of action to C. But can not B waive the performance and discharge A from all liability? Certainly, up to a certain point of time—that is, up to the time when B himself becomes bound to C through the assent of C to the contract, and his reliance thereon. From this time forth it should require in addition the consent of C in order to rescind, for from this time consideration is moving from C. Whether the mere assent of C is sufficient, or whether it is necessary that C should act further upon his reliance on the contract in order to make it impossible for A and B to rescind by mutual consent, is a question of sufficiency of consideration, and to be decided according to the rules applicable to that topic.

HENRY O. TAYLOR.

New York.

KENTUCKY COURT OF APPEALS.

LOUISVILLE & NASHVILLE R. R. CO. v. BROWN.

(Filed June 9, 1881—Not to be reported.)

1. When it is assigned as an error that the verdict is contrary to the evidence, the failure to pass upon that question, on a former appeal, will not determine the action of the Court of Appeals on a like question where there has been another trial; still it is to be presumed that this court regarded the evidence as sufficient, otherwise it would have adjudged so as to prevent future litigation.

2. Faulty and objectionable instructions for the plaintiff were, in this case, canceled by the instructions given for the defendant.

3. In a notice for making an appraisement of stock killed upon a railroad both time and place should be designated, otherwise damages should not be awarded on the judgment.

4. The time of the appraisement should not be on, or fixed for, the same day notice is given, but the parties should be afforded an opportunity to take proof.

Appeal from Hart Circuit Court.

Opinion of the court by Judge Pryor.

On the former appeal in this case one of the questions distinctly passed on by this court was as to the burden of proof, but one of the errors assigned was that the verdict was contrary to the evidence. While the failure to pass on that question at the former hearing could not determine the action of the court on a like question where there has been another trial, still it is to be presumed that this court regarded the evidence as sufficient to authorize the recovery, for if not it would have been so adjudged so as to prevent future litigation. Besides, this is the second verdict on the same facts, and while there is no valid reason for discrediting the testimony of the engineer, there is an apparent conflict in the evidence. The owner of the animal says that he discovered no tracks made by the animal or other indications of its being struck by the cars at the place designated by appellant's witness, but he did find tracks and blood at other points at and near where the animal was found. Where the mare was killed, or rather thrown on the side of the road, there seems to have been a narrow cut in the road so hemmed in by bushes and briars as to prevent any escape except by taking the road, and while in this position on the side of the track and unable to escape the crippling might have been inflicted, and from the statement of the owner it is

altogether plausible. The jury had the witnesses before them and were fully acquainted with the location of the road, either from their personal knowledge or from the proof. It was not necessary that the jury should have been sent to the place in order that they might have a view of the surroundings. The evidence was plain as to the character of the ground and the locality of the crossing, as well as the approach to it, and to have sent the jury to view the spot would have been a reckless waste of time.

While the instructions given for the appellee may be, to some extent, objectionable they were canceled by the instructions given for the defendant, and in fact those given for the defendant were more favorable than they should have been, and while this court on the former hearing failed to pass on the facts, when the question was directly made and when two juries have found a verdict for the appellee on the same facts, it becomes very persuasive that the evidence of the owner of the animal should have some weight in determining the question at issue, and this court will not, therefore, disturb the verdict.

The damages, however, ought not to have been awarded on the judgment. There was no time or place designated in the notice for making the appraisement, nor should it have been made on the same day the notice was given. The parties ought to be afforded an opportunity for taking proof so that the appraisement might be fairly made. The fact that the appraisement went to the jury as evidence was erroneous, but the appraisers having been examined as witnesses on the trial no injury need have resulted from it.

The judgment is reversed, with directions to set aside the order awarding damages and permit the judgment on the verdict to stand. The appellee must pay the costs.

Lyttleton Cooke and W. H. Chelf for appellant.

HAYDEN v. CRUTCHFIELD'S EX'OR.

(Filed June 25, 1881—Not to be reported.)

1. Landlord can subject a crop of tobacco, grown upon the rented premises, to the payment of rent, when there is not a sufficiency of provisions to support the widow and children of the deceased tenant one year, and when

there is no other growing crop, other property, or money to supply the deficiency.

2. The growing crop exempt from execution under the statute is only such crop as would be suitable for the purpose of provisions.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Hines.

We do not perceive how appellants were prejudiced by the entry of the judgment one year after it had been announced. They were present in court and assigned no valid reason why the judgment should not be entered, but they complain that it was error to enter the judgment without previous notice. The object of notice in such cases is to enable the party to show cause why the judgment should not be entered, but if the party is present in court and suggests no ground against the entering of the judgment the reason for notice ceases; besides, if it were a technical error we would not disturb the judgment, because the error does not appear to be prejudicial to appellant's substantial rights.

Only remaining question is, can the landlord subject to the payment of rent a crop of tobacco grown upon the rented premises when there is not a sufficiency of provisions to support the widow and children one year, and when there is no other growing crop, other property or money to supply the deficiency? The statute provides that the landlord may subject to the payment of his rent any property not exempt from execution; and, further, that there shall be exempt from execution "a sufficiency of provisions, including breadstuffs and animal food, to sustain the family one year; and if there be not a sufficiency of provisions on hand for that purpose, so much of the live stock suitable for the purpose, and of the growing crop, if any, as may be necessary to supply the deficiency."

It will be observed that this statute is unlike that in regard to descent and distribution. That statute provides that the deficiency may be made up out of other property or money on hand, while the statute quoted makes no such provision. The growing crop exempt from execution under the statute quoted is only such crop as would be suitable for the purpose of provisions, as has been frequently held by this court.

Wherefore, the judgment is affirmed.

Little & Slack for appellant.

Owen & Ellis for appellee.

McKNIGHT v. KENNEDY.

(Filed June 25, 1881—Not to be reported.)

John L. Martin's devisees have power to sell estate devised to them.

Mrs. Thomas S. Kennedy and her husband have the right to dispose of the estate devised to her by John L. Martin, deceased, as decided in *Kennedy v. Ten Broeck*, 11 Bush, 241, and *Duncan v. Kennedy*, 9 Bush, 580.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

The will of John L. Martin has been heretofore construed by this court, and under the construction given that instrument then and now there can be no doubt as to the right of Kennedy and wife to dispose of that part of the estate devised to Mrs. Kennedy.

In the case of *Kennedy v. Ten Broeck*, 11 Bush, 241, Mrs. Ten Broeck, who was a granddaughter and one of the immediate devisees under this will, disposed of her interest in the estate prior to her death, and, although dying without leaving issue, this court held that she was vested with a fee under the will, and had the right to convey.

The contingency upon which these immediate devisees (Mrs. Kennedy being one of them) were to be divested of their interests can not now possibly happen, as by the provisions of the will that contingency must have happened prior to January 1, 1872. This was the ruling in the case of *Duncan v. Kennedy*, 9 Bush, 580, and it, therefore, results that the power to convey is unquestioned.

Judgment affirmed.

Byron Bacon for appellant.

Russell & Helm for appellee.

CITY OF COVINGTON v. WOODS.

(Filed June 25, 1881—Not to be reported.)

1. Contracts with a city are void where the council had the power to contract in a particular way, and contracted otherwise.

2. Presumption—A party contracting with the city is presumed to know the law regulating the mode of contracting.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Pryor.

Our attention having been called to the case of *Murphy v. The City of Louisville*, 9 Bush, we can not well see how this judgment is to stand if the principle recognized in that case is to govern this, and we see no reason for departing from the rule. The cases are analogous, and there is no reason for making an exception.

The council had the power to contract in a particular way only, and the party contracting with the city must be presumed to know the law regulating the mode of contracting, and under what state of case such contracts for improvements can be made.

In this case it was held in the former opinion that the council had no power to make the contract without first referring their proceedings to the committee on law, and having failed to do this the contract was invalid.

It was the duty of the appellee to see that they were acting within the scope of the authority given.

Rehearing granted and judgment reversed and cause remanded.

M. L. Roberts for appellant.

D. A. Glenn for appellee.

SEWELL v. COMMONWEALTH.

(Filed June 25, 1881—Not to be reported.)

1. Evidence as to another difficulty, not part of the *res gestæ*, was incompetent.

2. Limiting arguments of counsel in trial courts—The lower courts have a large discretion in limiting arguments before the jury, and the Court of Appeals will not reverse, except in case of a gross abuse of that discretion.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Hines.

It was error to admit evidence as to what occurred in the house between Miss Davis and appellant prior to the shooting of Dunbar. Dunbar was not present; took no part in it, and had no connection with the difficulty in the house, and, so far as is shown by the record, he had no knowledge of it. The

transaction in the house in which Miss Davis was abused by appellant was not a part of the transaction in which Dunbar was killed, and in no way illustrates it. (Wheaton on Evidence, volume 1, section 259. *Highly v. Commonwealth*, MSS. Op., January 19, 1876.)

As to the limitation of the argument of counsel, it is sufficient to say that the lower court has a large discretion in such cases, and this court will not reverse, except for a gross abuse of that discretion, of which we see no evidence in this case.

But for the error indicated as to the admission of evidence the judgment is reversed and cause remanded, with directions for a new trial.

A. R. Burnam and W. B. Smith for appellant.

P. W. Hardin, Attorney General, for appellee.

HICKS v. COMMONWEALTH.

(Filed June 25, 1881—Not to be reported.)

1. On an application for a change of venue, according to the act approved April 1, 1880, the court shall hear all witnesses that may be produced by either party, and from the evidence determine whether or not the applicant is entitled to a change of venue.

2. Selection of jurors without regard to race or color—Where the jury commissioners were instructed by the court to select the jury without regard to race or color, there is no ground for complaint, although no negro may be upon the jury, unless it appears that persons were excluded on account of race or color.

Appeal from Kenton Criminal Court.

Opinion of the court by Judge Hines.

Appellant, a negro, was indicted for, and convicted of, killing a white man and sentenced to death.

On this appeal it is complained, first, that the court erred in refusing a change of venue; and, second, that the court erred in refusing to quash the indictment and to sustain a challenge to the panel because there was no negro or colored person on the jury, and that such persons had been excluded on account of color.

As to the first point: By an act approved April 1, 1880, it is provided that on an application for a change of venue the court shall hear all evidence produced by either party and from

the evidence determine whether the applicant is entitled to a change of venue. The evidence introduced on the trial of these motions sustained the conclusion of the court below that a fair and impartial trial could be had in the county where the offense was committed and where the indictment was pending.

As to the second point: It is sufficient to say that the evidence shows that, under the instruction of the court, the jury commissioners selected the jury that tried the cause without regard to race or color, and that no person was excluded from the jury on account of race or color.

Unless in the selection of the jury persons were excluded on account of race or color appellant has no right to complain, as it appears from the record that he had a fair and impartial trial. (*Commonwealth v. Johnson*, 78 Kentucky, 511.)

Judgment affirmed.

T. F. Hallam for appellant.

P. W. Hardin for appellee.

UTZ v. COMMONWEALTH.

(Filed June 25, 1881—Not to be reported.)

1. Infant may repudiate his contract, by repossessing himself of property sold by him without any felonious intent.

2. Where personal property has been sold by an infant, its abstraction from the premises of the vendee by the infant vendor, without felonious intent and merely to repudiate the sale, does not constitute a larceny.

Appeal from Boone Circuit Court.

Opinion of the court by Judge Pryor.

That the accused took the mare with the intention of keeping her is no evidence of a felonious intent from the facts found in this record. The proof shows that the accused was about eighteen years of age, and had exchanged this mare, alleged to have been stolen by him, with one R. L. Willis for an animal belonging to Willis; that after the exchange he went at night and took the mare originally belonging to him from the possession of Willis, and carried her across the river; that he made no effort at concealing the fact of his possession, or did any other act save that of taking the mare in the night, involving a felonious intent. While the entry on the premises

of Willis was a trespass, the accused, having regained the mare, had the right to trade her as his own and to repudiate the contract. Nor does the fact of Willis' knowledge as to his infancy affect the question of guilt or innocence. If the taking was to repudiate the contract and reclaim that which he had the right to demand he was not guilty of the alleged larceny.

In *Williams v. Norris*, 2 Littell, Annie Gillespie, an infant, sold to Williams a certain mare, and afterwards regained the possession and then sold the mare to Norris. Williams brought action of trover against Norris for the animal, and the latter, in order to defeat the recovery by Williams, offered to prove that at the time of the sale to Williams Annie Gillespie was an infant, and the court below excluded the evidence. This court held that, being an infant, the vendor had the right to disaffirm the sale, and if she did so and regained the possession, no matter how, she had the right to resell it.

So, in this case, if the appellant, repudiating the sale, had resold it to a third party the title could have passed, and it must reasonably follow that he was entitled, upon the facts of this record, to an acquittal instead of a conviction.

Judgment reversed and cause remanded, with directions to award a new trial.

J. J. Landram for appellant.

P. W. Hardin for appellee.

MOSS v. F. HALL, AND MOSS v. M. D. HALL.

(Filed October 6, 1880.)

1. Infants can appeal at any time during their minority, or at any time within one year after arriving at the age of twenty-one years.

2. Homestead rights is not waived when the wife fails to unite in the granting clause of the deed, and the deed shows that she only relinquished her dower.

3. Abandonment of Homestead by the widow, and her failure to appeal within proper time, can not prejudice the rights of her infant children to such homestead.

4. Homestead is subject to the payment of purchase money, and to that extent the land should be sold regardless of homestead rights.

5. But if the title to the land is in the widow her children have no homestead right in this case.

Appeals from Mercer Circuit Court.

Opinion of the court by Judge Pryor.

Section 745, Civil Code, provides that "an appeal shall not be granted except within two years next after the right to appeal first accrued unless the party applying therefor was then a defendant in the action and an infant not under coverture, or of unsound mind, or a person who did not appear by attorney, in which cases an appeal may be granted to such parties or their representatives within one year next after their deaths or the removal of their disabilities, whichever may first happen."

In this case those representing the infant defendants have failed to prosecute an appeal within two years from the date of the judgment, and this is made a defense by way of answer to the appeal by the infants. Having the right to an appeal upon their arriving at age, we see no reason why the appeal should not be allowed them at any time during their minority. They are asserting a claim to the homestead to which they are clearly entitled, and if they are postponed by reason of the failure of the guardian ad litem to appeal until they arrive at the age of twenty-one years, their right to a homestead is then gone. If a recovery is had against them by a plaintiff in the court below, and no appeal taken within the two years, he may take possession of their property, real or personal, and hold it until they arrive at age, and then it is conceded the infant defendant may ascertain what his rights are.

An infant may show causes against a judgment affecting his right within twelve months after arriving at age. This court held in *Newland v. Gentry* that there was no reason why it could not be shown at any time during the infant's minority. A different construction of this section of the Code would not only prejudice the rights of infants, but render uncertain the interests of all parties who claim as against the infant defendants, if the latter are not allowed to prosecute an appeal until they arrive at twenty-one years of age.

It is to the interest of all parties, if there is an error in the judgment, that it should be ascertained and their rights finally determined. The appeal by the infant would be a complete bar to any appeal after arriving at age, and it was never contemplated that such a construction should be given the statute as would prejudice the settlement, not only of the rights of in-

fants but of those litigating with them, for years after the judgment has been rendered, when the infants appear in court by those entitled to be heard for them, asking a final adjudication so important to the interest of all concerned.

The order dismissing the appeal as to the infants is, therefore, set aside. These infants are entitled to a homestead in the land of which their father died possessed. In the conveyance of July, 1871, the wife not only fails to unite in the granting clause of the conveyance, but that instrument on its face shows that she only relinquished her dower.

The case of *Wing v. Hayden*, 10 Bush, and *McGrath v. Berry*, 18 Bush, are conclusive of this question. The fact that the mother has abandoned the premises, or has failed to take an appeal within the proper time, can not prejudice their rights or prevent the undisturbed enjoyment by them of the homestead right. A part of the consideration expressed in the deed of 1871 was the purchase money due the grantor under the original contract, and to that extent the land should be sold regardless of the homestead.

Judgment reversed as to the infant appellants. The appeal of Mrs. Moss has heretofore been dismissed. The cause is remanded for further proceedings.

Response of the court by Judge Pryor, filed October 21, 1880, to petition of counsel of F. Hall for a modification of the opinion:

It is certain that the widow claims a homestead to the land on which her husband was living at his death. He was not only in the possession but occupied it as a homestead, and the chancellor ought not to have sold the homestead as against the infants, although their guardian ad litem asserted no claim to it.

At the date of the conveyance in July, 1871, the husband was in the actual possession, and a number of witnesses say he was living on it at his death. So far as any purchase money may be owing upon it the claim of the children is subordinate as stated in the original opinion.

Petition overruled.

Response of the court by Judge Pryor, filed June 16, 1881, to petition of counsel of M. D. Hall for a rehearing:

We are not satisfied from re-examination of this record as to the rights of these infants. If the devise of the estate of their

father was to the mother for life, and she has never renounced the provisions of the will, then the property is in the mother, and under the decree of this court, in the case of Watson v. Churchill, the mother can not hold under and against the will. The title being in her no homestead exists with the children.

The case is remanded for further preparation, and the former mandate is modified so as to present this question to be determined, and if the widow has not renounced the provisions of the will the judgment should be adverse to the infants. (Watson v. Churchill, 12 Bush, 524; Allensworth v. Kimbro, MSS. opinion for publication from Todd county.)

FARMER v. HAWKINS' ASS'EE.

(Filed December 9, 1880.)

1. Mortgage must be recorded within thirty days after its execution, otherwise it is not effectual as to creditors proceeding under the statute of 1856.

2. A mortgage within the statute, though fraudulent in law, is not fraudulent in fact, and although within the statute as to antecedent debts, is valid as to a debt created simultaneously with the execution of the mortgage.

3. To make a mortgage unassailable by creditors the following circumstances must concur:

First. It must have been made in good faith.

Second. It must have been made to secure a debt or liability created simultaneously with the execution of the mortgage.

Third. It must have been recorded within thirty days after its execution.

Appeal from Franklin Circuit Court.

Opinion of the court by Chief Justice Cofer.

The facts in this case are in substance these: Hawkins being insolvent and liable to Farmer as surety for his (Hawkins') son on a note for \$500, Farmer loaned Hawkins \$1,000, and surrendered the \$500, and took a mortgage on Hawkins' land for \$1,500.

The mortgage was not recorded, nor lodged for record, for some months after its date. In the meantime Hawkins made a general assignment for the benefit of all his creditors, but referring in the deed of assignment to the mortgage to Farmer in such way as to give notice to all claiming under the deed of the existence of the mortgage. In a day or two after the deed

of assignment was executed and lodged for record Farmer had his mortgage recorded. More than six months after the date of the mortgage Gault, a judgment creditor of Hawkins, brought suit against Hawkins and Farmer for the purpose of having the mortgage to Farmer adjudged within the act known as the act of 1856—now article 2, chapter 44, of the General Statutes.

A mortgage within the act of 1856, though fraudulent in law, is not fraudulent in fact, and although the mortgage may be within the statute as to the antecedent debt, yet, to the extent that money was loaned simultaneously with the execution of the mortgage, Farmer is entitled to hold it as security for the repayment of the loan unless he has lost that right by failing to record his mortgage in time.

The first section of the act provides that every mortgage, etc., made by a debtor in contemplation of insolvency and with the design to prefer one or more creditors to the exclusion, in whole or in part, of others, shall operate as an assignment and transfer of all the property and effects of such debtor, and shall inure to the benefit of all his creditors (except as therein provided) in proportion to the amount of their respective demands; "but nothing in this article shall vitiate or affect any mortgage made in good faith to secure any debt or liability created simultaneously with such mortgage, if the same be recorded within thirty days after its execution."

It is contended for Farmer that as his mortgage was given to secure \$1,000, loaned simultaneously with the execution of the mortgage, and notice of its existence was brought home to Gault and the other creditors before they had perfected their right to the property or its proceeds, he has a right to be preferred for that amount to the extent of the property mortgaged.

It is contended on the other hand that, as the mortgage was in part to secure an antecedent debt, and as to that part was within the statute, and the mortgage not having been recorded within thirty days after it was executed, Farmer has no right to a preference even for the thousand dollars loaned simultaneously with the execution of the mortgage.

It is clear that but for the last clause of the section *supra* no preference could be allowed for any part of the debt attempted to be secured by the mortgage.

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The mortgage was made in contemplation of insolvency and with the design to prefer Farmer as to the antecedent debt of \$500, and it operated ipso facto and eo instanti to transfer all his estate for the benefit of all his creditors in proportion to the amount of their respective demands. Thus far there is no provision for any preference.

The last clause of the sentence does, however, provide for a preference in a given state of case.

But this clause is in the nature of a proviso or condition excepting mortgages under certain circumstances from the sweeping provisions contained in the preceding part of the section. To be within the exception or saving, first, the mortgage must have been made in good faith; second, it must have been made to secure a debt or liability created simultaneously with it; and, third, it must have been recorded within thirty days after its execution.

The legislature might have omitted the saving altogether and thus have deprived a mortgagee of any preference in case the debtor was insolvent and made the mortgage with the design to apply money or property received thereon to prefer a creditor.

But it saw proper, instead of doing so, to provide that a mortgage made upon a simultaneous consideration shall not be vitiated or affected upon condition that it is recorded within thirty days. This is equivalent to saying that if not so recorded it shall be affected, and the mortgaged property shall pass to the creditors generally, with the residue of the mortgagor's estate.

The judgment is in accordance with these views, and must be affirmed.

A. J. James for appellant.

D. W. Lindsey for appellee.

ROBINSON v. DUVALL, &c.

(Filed September 18, 1880.)

1. A life policy as between the assured and the insurer is strictly and only a contract, and is subject to the general rules which govern in the interpretation of other contracts, but with respect to the beneficiaries it is held to be a testamentary provision rather than a contract.

2. The share of one of the beneficiaries upon his death will pass to the

surviving beneficiaries and their heirs, and does not result to the assured, where the policy is renewed by the payment of the annual premium, and no contrary intention appears.

3. "A policy of insurance on the life of any person, expressed to be for the use of any married woman, whether procured by herself, her husband, or any other person, shall inure to her separate use and benefit and that of her children, independently of her husband or his creditors, or the person effecting the same or his creditors." (Section 30, Act of March 12, 1870.)

4. The assured had no right to assign the benefit of the policy in this case, where the policy was for the benefit of his wife and children, so as to defeat the heir at law of one of the beneficiaries who died before the assured.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Cofer.

April 1, 1872. B. F. Crowfoot insured his life in the Connecticut Mutual Life Insurance Co. for the sum of \$5,000, payable to his wife and children or their representatives. At the date of the policy the insured had three children, all minors and unmarried. In a few days thereafter his wife died. He continued to pay the annual premiums as they fell due until April 7, 1878, when he died, having survived all his children, two of whom died in infancy and unmarried, and one, having married, left an only child, the appellee, W. T. Duvall, and her husband surviving her.

Before his death, and after the death of all his children, the insured assigned and delivered the policy to his niece, the appellant, Hattie E. Robinson, intending it as a gift to her.

The executor of the insured, the guardian of the infant grandson, W. T. Duvall, and Hattie E. Robinson all claiming the proceeds of the policy, the insurance company brought its petition of interpleader and paid the money into court, and the court having adjudged it to W. T. Duvall, Robinson alone has appealed.

Her counsel argues in effect that upon the delivery of the policy Mrs. Crowfoot and the three children of the insured became invested each with a one-fourth interest in it, and that upon the death of Mrs. Crowfoot her interest passed to her husband under the statute of distributions, and that at the death of the unmarried daughters their interest passed to their father in the same way, and at the death of Mrs. Duvall, during the life of her father, her interest lapsed as if it had been

a legacy, and in this way insured became the owner of the entire policy and could invest the appellant with a good title.

A life policy, as between the assured and the insurer, is strictly and only a contract for the payment of [money upon the happening of a contingency, uncertain only as to the time when it will occur, and is subject to the general rules which govern in the interpretation of other contracts. But when considered with respect to the rights of those who claim to be beneficiaries, especially when they are the natural objects of the affection and bounty of the person procuring and paying for the insurance, should be regarded in the light of a testamentary provision rather than of a contract.

The object of all interpretation of acts or words is to arrive at the intentions of the person whose acts or words are to be interpreted, and the nature of the transaction and the relation of the parties are frequently important, and sometimes controlling factors in the problem.

In taking the policy the insured was not providing for himself, but for his wife and children after his death, and it would be unreasonable to suppose that he intended, in case one of these objects of his affection should die during his life, that the interest of the one so dying should pass to himself and at his death to his personal representative. It would be more consistent with his evident design in insuring his life for the benefit of all his family, wife and children alike, to suppose that his intention was that, in case one or more should die before himself, without leaving children, the share to which those dying would have been entitled, had they survived him, should go to the survivors. He dedicated the whole to his family, share and share alike, and as the family was reduced by death and he came to renew the policy by paying the annual premiums, it can scarcely be doubted that he did so in order to provide for those who still survived, and this evident intention ought not to be defeated unless there are insurmountable obstacles in the way of effectuating it.

So far as any interest the wife of the insured had in the policy is concerned the rights of the parties are regulated by statute in harmony with the view just expressed.

"A policy of insurance on the life of any person, expressed to be for the use of any married woman, whether procured by herself, her husband, or any other person, shall inure to her separate use and benefit and that of her children, independently of her husband or his creditors, or the person effecting the same or his creditors." (Section 30, Act 12th March, 1870; 1 Acts '71.)

When Mrs. Crowfoot died her interest in the policy inured under this statute to the benefit of her children.

When one of the children subsequently died without living issue, and the policy was again renewed by the payment of the annual premium, there was, in a modified sense, a new contract (*Thompson v. Cundiff*, 11 Bush, 578), which inured to the benefit of the children then living, there being no issue of those who were dead. So that at the death of Mrs. Duvall, the last survivor of the children of the insured, she was the sole beneficiary.

Section 32 of the statute *supra* provides that "when a policy is effected by any person on his own life, or on the life of another, expressed to be for the benefit of * * * * a third person, the person for whose benefit it was made shall be entitled thereto against the creditors and the representatives of the person effecting the same."

At the time the policy was last renewed before their death Mrs. Duvall was the only surviving child of the insured, and as she was the only living person answering the description of beneficiaries as contained in the policy, as the other beneficiaries had died without issue, it is to be taken to have been renewed for her sole benefit. When it was last renewed she was dead, and there was no person living answering the description except her surviving child, who, in our opinion, is her representative within the meaning of that word as used in the policy.

In *Insurance Co. v. Palmer*, 42 Conn., 50, the policy was payable to the wife if she survived her husband; if not, to their children. The husband survived the wife, and one of the children died during the life of the father, leaving issue. It was held that the issue took the interest to which his father would have been entitled if he had survived the insured.

This is a much stronger case for the issue of the deceased child than that.

There the policy, in the contingency that had happened, was payable to the children; here it is payable to the children or "their representatives." This expression shows that the possibility of the death of some or all of the children during the life of the insured was not overlooked, and that such an event was intended to be provided for.

And when we consider the nature and design of life insurance and the relation of the parties, we think the policy should be construed as if it were payable to such of the children as should survive the insured and the surviving issue of such as might die during his life.

We are, therefore, of the opinion that the insured had no interest in the policy, and that the assignment made by him to the appellant gave her no right to any part of its proceeds, and the judgment is affirmed.

Elliott & Atchison for appellant.

Lane & Harrison for appellees.

BRIDGEFORD v. BURBANK.

(Filed November 14, 1874—Not to be reported.)

1. Surety in a bond of indemnity is released in this case by the conduct of the party indemnified. The conditions of the bond are fully set out and construed in the opinion.

2. A bond indemnifying a new member of a firm against half the pecuniary liability incurred by an appeal bond previously executed by the firm on an appeal from a judgment against the firm to the Supreme Court of Louisiana, did not protect such new member from any other firm liability incurred before, and existing at the time, he became a member thereof.

The firm being liable under attachment bonds for part of the debts secured by the appeal bond, the surety in the bond indemnifying against liability under the appeal bond was liable to such new member for half only of the balance paid by him after deducting the amounts realized or covered by the attachment bonds.

3. But by becoming so interested in the claims in litigation as to make it to his interest to have the judgment appealed from affirmed, without notifying his indemnitors, the new member released his indemnitors from all liability under the bond of indemnity.

4. When they signed the bond of indemnity the indemnitors had a right to expect the firm and the indemnified new member thereof to prosecute the

appeal in good faith and with reasonable diligence, and under the circumstances there was an implied contract between the parties to the bond of indemnity that they would so prosecute it.

5. The indemnified new member had no right to alter the situation by acquiring, however innocently, an interest in the appeal adverse to that of his indemnitors. He was, in a limited sense, the agent of his indemnitors to prosecute the appeal, and if by his own act, or that of the firm, he acquired such an interest in the judgment appealed from as to create in his bosom a conflict between self-interest and the duty he owed to his indemnitors, and without notice to the latter of such change of interest, he permitted the cause to progress to a hearing, he thereby subjected his indemnitors to a risk they could not have anticipated when they signed the bond of indemnity, and released them from liability.

Appeal from Jefferson Common Pleas Court.

Opinion of the court by Judge Lindsay.

On the 24th day of July, 1867, Clark A. Smith, as principal, and James Bridgeford, as surety, executed to Edward W. Burbank a penal bond in the sum of \$12,500. The stipulations of said bond are as follows:

"Whereas, the above-named Clark A. Smith has heretofore, and until the 24th day of July, 1867, been a partner in, and member of, the house of J. H. Oglesby & Co., of said New Orleans; and whereas, said Smith did on the said 24th of July sell, assign, transfer, and set over unto the said Edward W. Burbank all his right, title and interest in said house of J. H. Oglesby & Co.; and whereas, said Burbank did in said agreement of sale and transfer assume all liabilities and responsibilities of said Smith in and to said house of Oglesby & Co., excepting only and fully any and all such responsibility and liability as to him, the said Smith, might arise by reason of a certain bond given in the Fifth District Court of New Orleans for the appeal to the Supreme Court of Louisiana of a certain suit, entitled Lucien Harris v. W. G. Andrews & Co.

"Now the condition of this bond is such that if the said Clark A. Smith and the said James Bridgeford shall well and truly pay, or cause to be paid, unto the said Edward W. Burbank, his heirs, executors and administrators, the one-half ($\frac{1}{2}$) amount of all sum or sums which said Edward W. Burbank may at any time hereafter be condemned to pay by reason of his, said Burbank's, having signed as surety the said appeal bond in the case of Lucien Harris v. H. G. Andrews & Co.,

now pending in the Supreme Court of Louisiana, at the time when such sum or sums may become due in the discharge of the obligation in such bond of appeal mentioned; and shall from time to time, and at all times hereafter, save, defend, and keep harmless and indemnify the said Edward W. Burbank, his heirs, executors and administrators, and his and their goods and chattels, lands and tenements, of and from one-half pecuniary obligation on said bond of appeal arising, then this bond and obligation shall be void, and otherwise shall remain in full force and effect."

There were two appeal bonds executed in the case of Harris v. Andrews & Co. The one upon the appeal of Andrews & Co., the defendants in the district court, and the other upon the appeal of J. H. Oglesby & Co. who had intervened or interpleaded in said suit and asserted claim to certain property therein attached upon each of said bonds. The members of the firm of Oglesby & Co., either as a firm or in their individual capacities, were bound as principal obligors or as sureties, and upon each of them Burbank was bound as surety.

The first question arising in this case is, which of these bonds was it intended that the obligation of Smith & Bridgeford should indemnify Burbank against? To a correct understanding of this inquiry it is necessary to state briefly the facts attending the litigation which resulted in the execution of the two appeal bonds. Harris and Andrews & Co., for large sums of money, and among other property attached in the hands of J. H. Oglesby & Co. ninety-one bales of cotton, and in the hands of Summers, Brannin & Co. eighty-three bales of cotton.

December 18, 1866, Anderson & Co. procured the release of the attachment, as to said 174 bales of cotton, by the execution of a bond, with J. H. Oglesby & Co. (said firm being then composed of Oglesby & Smith) as sureties. The penalty of said bond was \$24,000, and its condition was that Andrews & Co. should satisfy such judgment as might be rendered against them.

By reason of this bond J. H. Oglesby & Co. were enabled to retain possession of the ninety-one bales of cotton then in their hands, and it seems that Summers, Brannin & Co. retained the eighty-three bales of which they had possession.

In December, 1866, J. H. Oglesby & Co. filed in the suit of *Harris v. Andrews & Co.* a petition of intervention, claiming that, as merchants, they had the right to subject to the payment of a debt of \$14,761.08 due them from Andrews & Co., the ninety-one bales of cotton in their possession, and that, by virtue of same contract or agreement with Andrews & Co. they held a claim upon, or an interest in, the eighty-three bales held by Summers, Brannin & Co.

Harris responded to said petition of intervention, setting up and relying on a preferred lien which he claimed to hold as the assignee of the landlord of Andrews & Co. Upon the trial of this cause Harris recovered judgment against Andrews & Co. for \$25,000 with interest and costs, and the petition of Oglesby & Co. was dismissed.

The attorneys representing H. G. Andrews & Co. appealed from the judgment against their clients, and J. H. Oglesby, Clark A. Smith and Robert W. Burbank executed as sureties an appeal bond for said Andrews & Co. in the sum of \$40,000. At the same time Oglesby & Co. prosecuted an appeal from the judgment dismissing their petition of intervention, and executed a bond in the sum of \$250 with Burbank as their surety. Bridgeford insists that he indemnified Burbank against loss or damage resulting from his surety on this last-named bond, whilst Burbank insists that the indemnity is against the obligation arising upon the bond executed for Andrews & Co.

The obligation of July 24, 1867, describes the responsibility or liability indemnified against as such as "to him, the said Smith, might arise by reason of a certain bond given in the Fifth District Court of New Orleans for the appeal to the Supreme Court of Louisiana of a certain suit, entitled *Lucien Harris v. H. G. Andrews & Co.*" It obligates Smith and Bridgeford "to pay to Burbank one-half of all sums he may be condemned to pay by reason of his having signed as surety the said appeal bond in the case of *Lucien Harris v. H. G. Andrews & Co.*," and to "keep him harmless and indemnify the said Edward W. Burbank, &c., * * * of, and from, the one-half pecuniary obligation on said bond arising."

The language used seems to point unerringly to the bond executed on the appeal of H. W. Andrews & Co. That bond is described certainly with reasonable accuracy, and if there had been no bond executed by J. H. Oglesby & Co. on an appeal growing out of that judgment rendered in the suit of Harris v. Andrews & Co. upon their petition of intervention, there would be no ground to question that the bond of H. W. Andrews & Co. is the bond against the "pecuniary obligation" of which Smith and Bridgeford undertook to indemnify Burbank.

The bond of J. H. Oglesby & Co. does not come within the description given. It was not executed "for the appeal to the Supreme Court of Louisiana of a certain suit, entitled Lucien Harris v. H. G. Andrews & Co.," but for the appeal (in an original proceeding of that style) of the suit of J. H. Oglesby & Co. v. Lucien Harris and H. G. Andrews & Co.

Upon the case as presented by the pleading and evidence the court below rightly held that appellant undertook to save, defend and keep harmless the appellee, Burbank, from loss or damage arising out of his being bound for Smith in the bond of appeal for \$40,000 executed for H. G. Andrews & Co.

We need not analyze the petition. It is not as concisely drawn as it might have been. The averments of fact are not as direct and specific as they should have been made, but it contains all the necessary allegations to make out a cause of action. The conditions of the bond of indemnity are fully set out. It is alleged that the judgment in the suit of Harris v. Andrews & Co. was affirmed by the Supreme Court of Louisiana, and thereupon proceedings in the district court, regularly had, upon the bond of appeal executed on behalf of H. G. Andrews & Co., Burbank was condemned to pay \$19,131, and was thereafter compelled to pay, and did pay on account thereof, \$9,565.62. He avers that appellant failed, neglected and refused to save, defend and keep him harmless from the obligations of said bond, as he had covenanted to do, and prays that he be compelled to indemnify him for his loss and damage so sustained by the judgment to him of said sum of \$9,565.62.

Appellant insists that by the terms of the bond of indemnity he is only bound to pay to Burbank one-half the sum or sums that he, Burbank, has been compelled to pay. He agreed to pay Burbank "the one-half ($\frac{1}{2}$) amount of all sums which said Edward W. Burbank may, at any time, * * * be condemned to pay by reason of his, said Burbank, having signed as surety the said appeal bond," and from "time to time, and at all times hereafter, to save, defend and keep harmless and indemnify the said Edward W. Burbank * * * of and from the one-half the pecuniary obligation on said appeal bond arising."

Considering all the language used, it is evident that Burbank was to be paid more than one-half of any amount he might be compelled to pay. "The stipulation of the bond is that Smith & Bridgeford will pay one-half the sum or sums he shall be condemned to pay," and this stipulation is further explained to mean "the one-half pecuniary obligation on said bond of appeal arising." This construction accords with the circumstances attending the whole transaction.

Bridgeford proves by his witness, Davidson, that the defense of the suit of Harris was entrusted by H. G. Andrews & Co. to J. H. Oglesby & Co., and that they employed counsel and managed the case.

Considering the facts proved by appellant it may be assumed that the suit was defended, and the appeal prosecuted at the instance, and for the benefit, of J. H. Oglesby & Co. In point of fact Burbank was surety on the appeal bond for Oglesby & Smith, and not for Andrews & Co. They were utterly and hopelessly insolvent, and doubtless regarded the suit in the district court as a contest between Harris and Oglesby & Co. over the attached property, and a matter in which they had no special interest.

Oglesby & Co. failed in the district court and in the name of their insolvent debtors executed the appeal bond, and prosecuted the appeal to the Supreme Court, and as between the members of that firm and Burbank they were primarily liable on said bond, and this was the liability of Smith in and to the said house of Oglesby & Co.; that the parties excepted out

of Burbank's general undertaking to assure all the liabilities and responsibilities of Smith in and to said house.

In order, therefore, to hold Burbank harmless, and to indemnify him against this excepted liability, it is necessary that Smith and Bridgeford shall pay one-half of the sum he has been condemned to pay, that is, one-half the "pecuniary obligation" that arose against the firm of Oglesby & Co., composed as it was of Oglesby and Burbank, on said appeal bond, when the judgment of Harris against Andrews & Co. was affirmed by the Supreme Court of Louisiana.

We do not concur with the court below as to the amount of the "pecuniary obligation" that then arose as against the new firm of Oglesby & Co.

It was not the full amount of the judgment of Harris against Andrews & Co., although Harris or his assignee had the right to proceed on that bond, and compel the obligors therein to pay the full amount of his judgment.

The appeal bond was a secured or cumulative security as to Harris. The bond to discharge the attachment upon which Oglesby & Smith, who composed the old firm of J. H. Oglesby & Co., were bound as sureties, was the firm security that had been given him. This bond secured to him \$24,000, and he might have proceeded upon it for that amount, and then looked to the appeal bond for such balance as might remain unpaid.

By the execution of this bond the eighty-three bales of cotton held by Brannin, Summers & Co. and the ninety-one bales held by Oglesby & Co. were released. The bond was substituted for said cotton, and by reason of its execution the proceeds of the ninety-one bales were applied to the payment of the debt due from Andrews & Co. to Oglesby & Co., and thus become part of the assets of said last-named firm.

The assets secured by the sale of the ninety-one bales of cotton were of course charged with the payment of so much of the claims of Harris as were secured by the attachment bond, and when Burbank purchased from Smith the latter's interest in the house of Oglesby & Co. he took the proceeds of these ninety-one bales of cotton subject to the contingent liability of having to surrender them in satisfaction of said bond. This fact he recognized when the firm of Oglesby & Co., of which he

was then a member, consented that the proceeds of the eighty-three bales held by Brannin, Summers & Co. should be so applied.

It was by the application, among other funds, of the proceeds of said eighty-three bales of cotton that the claim of Harris, or rather of his assignee, was reduced to the sum finally paid by Oglesby and Burbank, viz., \$19,181.

The liability of Smith upon the attachment bond was not excepted out of the liabilities assumed by Burbank, and he could not, by making payment on a judgment founded on the appeal bond, escape his liability on the attachment bond, and shift it upon Bridgeford, the surety for Smith. As between the owner of the Harris judgment and Smith the payment of the judgment founded on the appeal bond was a satisfaction of all claims or rights arising out of the attachment bond; but as between Burbank and Bridgeford to the extent that the proceeds of the ninety-one bales of cotton satisfied the judgment on the appeal bond. Burbank was paying his own debt, and not that of Smith.

Smith was bound on the appeal bond, as between himself and Burbank, for one-half the balance due to Harris or his assignee, after the proceeds of the 174 bales of cotton had been applied to the satisfaction of his judgment. Hence, from the \$19,181 paid by Oglesby & Co. the proceeds of the sale of the ninety-one bales of cotton should be deducted, and Bridgeford then held to account for one-half the balance.

As a further ground of defense Bridgeford relies on the fact of Burbank (as a member of the firm of Oglesby & Co.), pending the appeal in the Supreme Court, and before the judgment against Andrews & Co. was affirmed, becoming part owner thereof, as working, as matter of law, his release as surety on the bond of indemnity. He also charges that Oglesby & Co. fraudulently interfered to procure the affirmance of said judgment.

The circumstances under which Oglesby & Co. acquired an interest in the judgment of Harris against Andrews & Co. are not such as to authorize the inference of bad faith upon the part of uBrbank. His firm was compelled to accept the trans-

fer of an interest in said judgment in satisfaction of a claim against a failing debtor, or else to lose the whole of a debt contracted, so far as the record shows, without the slightest view upon their part of looking to said judgment as a security.

Notwithstanding this fact, however, if, by reason of this transfer, Burbank became so far interested in the Harris judgment as to make it his interest to have it affirmed rather than reversed by the Supreme Court, Bridgeford ought not to be held bound on the bond of indemnity. When Bridgeford signed said bond he had the right to expect, and no doubt did expect, Oglesby and Burbank to prosecute the Andrews & Co. appeal with good faith and reasonable diligence, and, under the circumstances, there was an implied contract between the parties to the bond of indemnity that they would so prosecute it. Burbank had no right to so far alter the situation by acquiring, however innocently, an interest in the appeal in the Supreme Court adverse to that of Bridgeford. He was, in a limited sense, the agent of Bridgeford to prosecute said appeal, and if by his own act, or that of his firm, he acquired such an interest in the Harris judgment as to create in his bosom a conflict between self-interest and the duty he owed to Bridgeford, and without notice to the latter of such change of interest, he permitted the cause to progress to a hearing in the Supreme Court, he thereby subjected Bridgeford to a risk that he could not have anticipated when he signed as surety for Smith. If there was such a change of interest (a question of fact upon which we express no opinion), Burbank necessarily lost all incentive to labor for the reversal of the judgment against Andrews & Co. He profited by its affirmance, he would have lost money had he succeeded in the attempt he contracted with Bridgeford he would make to reverse it. If by the acquisition of the alleged interest Burbank changed the attitude of himself and Bridgeford, and by such change increased the risk of the latter, he can not complain that the surety, whose rights were disregarded and whose risk was increased, is thereby discharged from the obligations of his contract of suretyship (5 Maryland, 109; 4 Monroe, 492). Bridgeford is not bound to show actual injury. If he shows that the judgment of Har-

ris v. Andrews & Co. was affirmed by the Supreme Court of Louisiana, and that Burbank profited by the affirmance, his defense is made out.

Of course if Burbank, by himself or through the agency of his firm, interfered to procure an affirmance of the judgments against Harris & Co., such interference operated to discharge Bridgeford, as a party indemnified can not be allowed to be instrumental in bringing about the event upon the happening of which the liability of the indemnitor depends.

We need not decide whether the court erred in compelling appellant to answer before a complete transcript of the proceedings in the Louisiana court was filed, as upon the return of the cause he may avail himself by an amended answer of any information acquired therefrom.

The alleged error as to the admission of the statement of Dupuy need not be considered, as the deposition of the absent witness will doubtless be taken before another trial of the cause. As some of the rulings of the court below do not conform to the views herein expressed the judgment is reversed and the cause remanded for a new trial upon principles consistent with this opinion.

Response of the court by Judge Lindsay to the petition of counsel for appellee for a rehearing:

Counsel state in their petition "if Burbank got the proceeds of the ninety-one bales of cotton, it is right and fair (if there is no other agreement) for him to pay it on this execution."

Burbank purchased the entire interest of Smith in the partnership of J. H. Oglesby & Co. That firm sold the ninety-one bales of cotton and received the proceeds, and appropriated them to its purposes. It does not matter that upon their reception they were formally credited upon the claim held against the insolvent firm of Andrews & Co. Said proceeds certainly went into the business of J. H. Oglesby & Co. No part thereof was ever withdrawn by either partner, and hence when Burbank purchased Smith's interest and stepped into his shoes he received, as part of the assets, the proceeds of those ninety-one bales of cotton, either in the shape of money, choses in action, or of goods, wares and merchandise. Burbank contracted to

substitute himself for Smith in the payment of the debts of the old firm. But one liability was excepted out of his general undertaking, i. e., the liability on the appeal bond of Andrews & Co. executed in the suit of Harris. The liability of the firm to restore the proceeds of the ninety-one bales of cotton in case of the success of Harris did not arise on that bond, but on the attachment bond executed long prior to the prosecution of the appeal. The liability of the old firm on the attachment bond was not excepted out of Burbank's contract, and can not be escaped unless it be held that the execution of the appeal bond extinguished the obligations of the attachment bond. It will not be maintained that such was the case.

The bond of indemnity executed by Bridgeford does not in terms embrace the liability that accrued on the attachment bond, and as he as surety has the right to demand that the obligation shall be construed according to its legal import, we can not extend it by implication to a liability which it neither mentions nor alludes to. Further than this, it is not rational to suppose that Smith intended to indemnify Burbank against any liability of the old firm contracted in the regular course of trade, and the consideration for which was turned over to the new firm. The construction insisted on by appellee would compel Bridgeford to pay to Burbank, upon the worthless claim against Andrews & Co. held by the old firm and which passed to the new, one half the proceeds of the ninety-one bales of cotton, because of the improper credit given to them, when the old firm hoped to be able to defeat the action of Harris.

Counsel misapprehend the force of the opinion upon the question raised on the fact that the new firm of Oglesby & Co. became part owners of the judgment in favor of Harris while the appeal was pending in the Supreme Court of Louisiana.

We hold that there is nothing in the present record tending to show the slightest fraud in this matter upon the part of the new firm, and that it is not proved that it held and owned such an interest in said judgment as would incline it to desire an affirmance rather than a reversal. But as we can not anticipate the proof that may be made upon the next trial, we deemed it proper to say that, if it should be made to appear that the new firm acquired such an interest in said judgment

as to interest it in procuring an affirmance, then that Burbank thereby so far changed his attitude towards Bridgeford that (if the change was made without his consent and the appeal allowed to be finally disposed of without notice to him of the altered condition of the parties) he might claim exoneration without showing fraudulent interference by, or bad faith upon the part of, Burbank.

We are of opinion that this is good law. A party to whom another is bound as surety can not increase the risk of the surety, without his knowledge or consent, and still hold him bound, and if Burbank, or his firm, became so far interested in the Harris judgment as to desire its affirmance, it is manifest that Bridgeford's risk is thereby increased, and he is released although he may not be able to show bad faith or a breach by Burbank of his implied contract that the new firm of J. H. Oglesby & Co. would prosecute the appeal in good faith and with reasonable diligence.

We see no reason to modify the opinion of November 14, 1874, as herein explained.

The petition for a rehearing must, therefore, be overruled.

Lee & Rodman and Muir & Bijur for appellant.

Hagan & Dupuy for appellee.

It is a well-established rule that a surety is released from liability by any novation, arrangement, agreement or conduct of his obligee and principal, whereby the rights or liabilities of the surety are prejudiced or increased without his consent.

In many respects an indemnitor occupies the same relation as does a surety to the party to whom he is bound.

When a party is indemnified against a loss under circumstances which make it his duty to use all reasonable efforts to prevent the loss, he is bound to use such efforts to prevent the loss, and has no right by any act of his to make it to his interest that the loss should occur; and, if by any circum-

stance beyond his control, he should become so interested he should promptly notify his indemnitor of his changed relation and interest so as to give the indemnitor an opportunity of preventing the loss.

If under such circumstances the interest of the indemnified party is changed by his own act, however innocently, and he fails to notify his indemnitor of such change, he thereby releases his indemnitor from liability. This is the effect of the foregoing decision.

We are inclined to the opinion that in a case like this the indemnitor would be released from liability by the act of the indemnified party in changing his interest and duty with-

out the consent of his indemnitor, and the duty and obligations of the and that the liability of the indemnitor could not be continued without his consent by any notice to him. In the absence of current decisions of the Court of Appeals, during the summer recess, we have selected the going decision is well sustained by foregoing under the belief that it will the reasoning of the learned judge repay every lawyer and judge who who delivered it, and settles the law reads it.

But however this may be, the fore- summer recess, we have selected the going decision is well sustained by foregoing under the belief that it will the reasoning of the learned judge repay every lawyer and judge who who delivered it, and settles the law reads it.

as to the liability of an indemnitor

LOUISVILLE CHANCERY COURT.

COMMONWEALTH v. BAILEY.

(Filed July 8, 1881.)

"An act to regulate fees and salaries of certain public officers," approved April 9, 1880, is unconstitutional.

1. Because its title does not express the subject-matter of the attempted legislation as required by section 87, article 2 of the State Constitution.

2. Because it was a "bill for raising revenue," and was originated in the Senate and not in the House of Representatives, as required by section 80, article 2 of the State Constitution.

County Attorney Woolfolk obtained a rule against W. H. Bailey, marshal of the Louisville Chancery Court, to compel him to comply with the provisions of the act of 1880, generally known as the "Gathright Fee Bill." A response was filed claiming that the act was unconstitutional, and asking upon that ground that the rule be dismissed.

Opinion by Chancellor I. W. Edwards.

On rule obtained against him, on motion of the county attorney for Jefferson county, Ky., "to show cause why he shall not file with the clerk of the Jefferson County Court, State of Kentucky, his statement or report as required by the second section of an act to regulate the fees and salaries of certain public officers, approved by the General Assembly" April 9, 1880.

For response the respondent says: "There is no law requiring or providing for the filing of the report referred to in the rule;" that the act of April 9, 1880, upon which said rule is based, is unconstitutional for reasons on its face appearing; "and that said act is a law for raising revenue, and that it originated in the Senate."

It is insisted for respondent that said act of April 9, 1880, is unconstitutional and void:

1st. Because its title does not express the subject-matter of the attempted legislation as required by the 37th section of article 2 of the State Constitution.

2d. Because it was a "bill for raising revenue," and it originated in the Senate, instead of the House of Representatives, as required by section 30 of article 2 of the Constitution.

3d. Because it is an act to levy taxes for the use of the Commonwealth on certain classes of persons, in certain counties, and does not operate alike on all of the selected classes in all the counties of the State. The taxation attempted to be imposed is not general and uniform, and was not intended to be so, but was intended to be the arbitrary taxation of certain classes of persons in isolated counties, without regard to, and in violation of, the rule of the uniformity and equality in taxation established by the Constitution. The facts are conceded.

Section 37, article 2 of the Constitution reads thus:

"No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title."

Section 30 of article 2 reads thus:

"All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose amendments as in other bills, provided that they shall not introduce any new matter under color of amendments which does not relate to raising revenue."

It is also insisted for respondent that the act in question is in conflict with section 20, article 13 of the Constitution, which provides:

"That no ex post facto law, nor any law impairing contracts, shall be made."

The authority and duty of the judiciary in this country, to consider and declare a statute void which violates the Constitution, is conceded, but it is the duty of the court to exercise that authority with great caution, and it is sufficient if the general subject of the act be stated; and it must be remembered that it is the subject, and not the object or purpose of the act, that must be "expressed in the title." It is the matter to which the statute relates and with which it deals, and not what it purposes to do, which must be expressed. The

title is sufficient if it be sufficiently distinct as to the matter or subject to which it refers, if it relate to one subject only. And it can not be presumed that an act is in conflict with the Constitution, but it must so appear affirmatively.

The title of the act in question is: "An act to regulate the fees and salaries of certain public officers."

What is the subject to which this act relates?

In some sense it may relate to "fees," or salaries, or the fees and salaries of certain public officers, or to public officers.

Counsel for complainant say:

"The object of this act is to create certain fixed salaries for the public officers mentioned therein out of the fees collected by these officers, and to dispose of the surplus of said fees by turning it over to the State treasury, the place it belongs by virtue of the law. This is certainly the subject-matter of the title."

It is not entirely clear to what one subject the word "this," in the above copied extract, relates. And the question, what is the subject to which this act relates, within the meaning of the Constitution, recurs. The Court of Appeals of this State have delivered opinions touching the meaning of section 37 of article 2, *supra*, in the following cases, if no more, viz.:

Grundy v. Caruth, 12 Bush, 351.

Hind v. Rice, 10 Bush, 528.

Jones v. Thompson, 12 Bush, 394.

O'Donoghue v. Akin, 2 Duvall, 479.

Rushing v. Sebree, 12 Bush, 199.

Fuqua v. Millen, 18 Bush, 467.

In 1859, Chiles v. Drake, 2 Met., 150.

In 1859, Louisville & Oldham T. R. Co. v. Ballard, 2 Met., 168.

In 1859, Phillips v. C. & C. Bridge Co., 2 Met., 222.

In 1861, Johnson v. Higgins, 3 Met., 567.

In 1866, Wilson v. Louisville, 2 Duvall, 499.

In 1866, Swift v. Newport, 7 Bush, 42.

In 1871, Smith v. Cochrane, 8 Bush.

In 1871, Obannon v. L., C. & L. R. R. Co., 8 Bush, 348.

In 1871, McReynolds v. Smallhouse, 8 Bush, 453.

In 1874, *Jacob's Adm'r v. L. & N. R. R. Co.*, 10 Bush, 271.

In 1874, *Collins v. Henderson*, 11 Bush, 75.

In 1877, *McNeil v. Commonwealth*, 12 Bush, 780.

In 1879, *Geiger v. McLin*, 78 Ky., 232.

In 1878, *Howland Coal & Iron Co. v. Brown*, 13 Bush, 681.

Chiles v. Monroe, 4 Met., 75.

Hedger v. Remaker, 3 Met., 256.

Gibson v. Belcher, 1 Bush, 145.

Pennington v. Woolfolk.

Many of the States of this Union have in their respective Constitutions a similar provision to ours (section 37 of article 2), and a similar provision is found in the U. S. Constitution. From the various opinions of our Supreme Court, aided by adjudications of the courts of last resort of our sister States, and also by the U. S. Supreme Court, touching the meaning, scope and intent of the constitutional provision in question, it would seem that we might ascertain its true importance. It would extend this opinion greatly too much to examine the cases in detail.

An act of the assembly may be in conflict with section 37 of article 2, *supra*:

1st. For multiplicity of subjects.

2d. As it relates to the terms of the title.

In a constitutional sense, it is reasonably certain that the act of April 9, 1880, did not relate to more than one subject. But is that subject expressed in the title? If it is an act to raise revenue, then it is clear that the subject of the act is not expressed in the title.

Considering the various cases cited, the object and purpose of the constitutional provision in question, as expressed by the court in *Pennington v. Woolfolk*, "is to prevent the rise of deceptive titles as a cover for vicious legislation, by enabling members of the general assembly to form some opinion of the nature of a bill by merely hearing it read by the title." The provision must be construed reasonably and not in so narrow a sense as to unnecessarily embarrass legislation. "If the title indicates with clearness the subject about to be legislated upon, and the act itself is confined to that subject, that is all the Constitution requires." What general subject is suggested by "An

act to regulate fees and salaries of certain public officers," as the one about to be legislated upon? In a technical or popular sense it seems to me the regulation of the fees and salaries of certain public officers in Kentucky is the subject indicated by the title as the one about to be legislated upon.

If this is the reasonable meaning of the title of the act in question, and it does regulate the fees and salaries of certain public officers of this State, and the act "itself is confined to that subject, that is all the Constitution requires."

Without giving the details of the act, it is certain that this act does not diminish or increase the fees; that any officer named therein is, or was then, authorized to receive or collect the amount of fees to be paid by litigants, or to be received or collected by anyone of the officers named, is in no way diminished or increased by this act. The litigant nor the officer can in any way be benefited by the act. The only beneficiary of the act is the State.

"Fees are the rewards or compensation to be paid by individuals to public officers for their own or for the use of the public for official service rendered." "Salaries are the rewards paid to public officers out of public funds for such service."

Or, in other words, a salary is "an annual or periodical payment for services" (Webster), or "an annual or periodical payment for services; a stipulation, periodical recompense" (Worcester). "A fixed sum paid to a person for his services, yearly, half-yearly, or quarterly; stipend, wages." (Stormouth.)

In the ordinary popular sense it is certainly fixed and periodical remuneration for services.

To regulate means to adjust by rule, to reduce to system, to adjust, arrange, methodize, etc.

In the ordinary sense, as used in the title in question, I suppose it may be understood to mean to determine the amount of salaries or fees to be received by the officers named. I think certain that this act does not in any sense regulate the fees of any of the officers named therein. Their fees are collectible in the same manner, in the same amounts, by the same officers, as if this act had not been passed.

Hence this act clearly does not regulate the salary of any officer or officers, and as it does not regulate the fees or salary of any officer, it follows that the title of the act is misleading.

Section 1 of this act provides that no one of said officers shall receive * * * "from the salary, fees, etc., a sum greater than at the rate of \$3,000 per annum;" yet the second section provides that they may receive and collect all fees allowed by the general laws for their services. The real object of the act evidently was to prevent them from retaining for themselves respectively, out of their fees when collected and received, sums greater than \$3,000 each per annum when collected. They are each required to report in detail fees collected, and any balance, after paying deputies, expenses, etc., beyond the \$3,000 named, shall be paid to the trustee of the jury fund. The title of this bill certainly did not give to the members of the legislature any idea of the "nature of the act, or of the legislation intended thereby."

It regulates no fee and fixes no salary and does not even provide that any officer therein named shall receive a salary out of the fees he is authorized to charge and collect.

If the surplus of the fees thus collected for any one year shall be less than \$3,000, he must be content with whatever sum the surplus is, however small, hence the act does not regulate a salary in any sense.

In *Chiles, &c. v. Monroe*, 4 Met., 75, our appellate court considered "An act to amend section 2 of article 63 of the Revised Statutes, entitled limitation of actions and suits." The amendment was not confined to section 2 of the article named in the title, but operated upon almost every section of that chapter. The court said:

"The title is, therefore, misleading and delusive, affording no indication whatever of some of the subjects to which the act related."

It follows that the title of the act so far as it relates to fees, or so far as it purports to regulate fees, is in conflict with the act itself. Does it regulate the salary of any or of all the officers therein named? No one of said officers, according to the provisions of this act, can receive a fixed, certain, periodical compensation, a salary. The title of the bill is not such

as to indicate a purpose to create a salary, but to regulate it—create implies no previous existence—regulate refers to that which already exists. This act neither, in the technical or popular sense, regulates or creates a salary. If the fees of any one of these officers amount to less than \$3,000, after the deductions allowed by the act, the State does not supply the deficiency, nor is otherwise supplied, hence it can not be said that anyone of them receives a certain stipend—the amount of his compensation is uncertain and hence he does not receive a salary—the act does not fix the compensation of the officers. It only fixes and decides what he shall not retain. The act recognizes that it is his duty to collect and receive all fees earned by him, and provides that a certain surplus, if any, shall be by him paid over to the State. In other words, that he shall not retain all his fees if they exceed a certain sum. He certainly does not receive anything by virtue of this act, and as his compensation is uncertain and dependent upon various contingencies, he clearly does not receive a salary in sense, and hence the act can not be said to regulate his salary.

As to fees and salaries to be received by any of these officers, the matter stands without any change whatever by this act, save to take all they receive in fees beyond a certain sum from them and put it into the State treasury. The officer receives nothing by reason of the act; on the contrary, upon certain contingencies, he pays instead of being paid—no salary in this.

“It may well be supposed that, while an amendment of section 2 merely, as the title proposed, might have been unobjectionable to the members composing the legislative body by whom the act in question was passed, an amendment which gave a retroactive effect to the limitation of every description of suit or action might have been deemed highly injudicious.”

An act to regulate the fees and salaries of certain officers, State and county, might have been unobjectionable to the members who enacted it, while an act partial and local in its application, as this act is, “might have been deemed highly inexpedient.” A general law, applicable to all clerks, etc., of same tenor with this act, might not have met with serious opposition, but if the title had disclosed the fact that it was only

in certain counties that portions of the fees of the officers named were to be seized for publication, the probable injustice of the proposition might have aroused anxious opposition.

It is my opinion that the subject-matter of the act is not expressed in the title.

Is the act a bill for raising revenue? It is conceded that it originated in the Senate, and if it is a bill to raise revenue it is void.

Revenue is "the income of the government arising from taxation, duties and the like." (Bouvier.)

It "is the income of the State." (United States v. Bromley, 12 Howard.)

Any law which has for its object the taking of money from the people, directly or indirectly, is a bill for raising revenue.

Legislative measures are unmistakably bills for raising revenue, if they impose taxes upon the people, either directly or indirectly, if they give to the persons from whom the money is exacted no equivalent in return, other than the common benefit of good government. (Michels v. James, 18 Blackford, 207.)

It is this feature that characterizes all bills for raising revenue. They draw money from the people and give no direct equivalent in return.

A bill regulating postal rates for postal services provides an equivalent for the money which the citizen may choose voluntarily to pay. He gets the fixed services for the fixed rates, or he lets it alone as he pleases, hence not a bill to raise revenue.

Bills to raise revenue are confined to bills to levy taxes in the strict sense, and do not extend to bills for other purposes, which may incidentally create revenue. This is the narrowest limit.

We have seen that the act in question is not an act to regulate the fees and salaries of certain public officers. Is it an act to raise revenue? As before seen, the act does not diminish or increase the fees to be paid. The payor pays the same, and the payee receives the same. The surplus to be paid to the trustee of the jury fund goes into the State treasury for general governmental purposes. This bill does not incidentally create revenue, but that the raising of revenue is its only ob-

ject and effect on the compensation of the officer, instead of being its object is its incident.

An act fixing money penalties for misdemeanors or other offenses is not a bill to raise revenue, for plain reasons. The object and end of a bill of that kind is to prevent offenses, and the money penalty is a mere incident, as a punishment to the offender.

The regulation of fees and salaries of the officers named, if that be the object and end of the act in question, must be for the benefit of those who pay the fees and salaries or those who receive them—one class or the other or both. If any third party receives any benefit from the act such benefit is incidental only.

The State had no interest in regulating fees or salaries that she did not pay unless she interfered for the benefit of the payor against the payee, or of the payee against the payor, because the compensation authorized to be collected was either inadequate or exorbitant unless her object was to benefit herself by raising the revenue.

She has, by this act, taken a given surplus fund, if any, from the litigant or from the officer, and put it into her own coffers, without any change in the rate or amount of the fees from which the surplus is to arise, without relief to the payor or payee. She is the sole beneficiary of the act. The transfer of money from litigants or from officers to the State is the sole effect of the enactment, and hence it is, in my opinion, a bill to raise revenue, and as it originated in the senate, it is in conflict with section 80, article 2 of the Constitution, and for that reason void.

There are other serious questions as to the validity of the act in question that are suggested by this record but it is deemed unnecessary to notice them at present. Admitting the purposes of the bill to be wise and in the interest of the public, which is very questionable in its present form, still the formal defects of the bill are so manifest that I am compelled to judge them fatal to its validity.

Response sufficient.

SUPREME COURT OF CONNECTICUT.

DANIELS v. EQUITABLE FIRE INS. CO.

1. Where an insurance policy stipulated that it should be void if the risk were increased, the assured, under the facts of this case, had no right to put up an additional stove and other apparatus after the policy was issued, and without the consent of the company, thereby materially increasing the risk.

2. There being no express prohibition of the use of the additional stove, its erection, irrespective of the increase of the risk, would not avoid the policy, but the policy in this case expressly provided that if the risk were increased it should be void.

3. The policy was void even if there was evidence tending to show that the fire was not caused by the erection of the additional stove.

4. The condition in the policy providing for its renewal at the expiration of the term adding that, in case the risk were increased without the assured making that fact known to the company at the time of the renewal, the policy and renewal should be void, did not continue the policy in force during the term for which it issued, notwithstanding the increased risk, but was intended to extend the stipulation to the renewal.

Hartford county, January, 1881.

Opinion of the court by Judge Carpenter.

This is an action on a fire insurance policy. The cause was tried to the jury, and the plaintiff had a verdict. The defendants move for a new trial for misdirection, and for a verdict against evidence. On one point in the case we think the verdict was clearly against the weight of evidence, and we will confine our attention mainly to that.

The property insured is described in the policy as follows:

"Furniture, fixtures and tools used by the assured in his business as renovator of furniture, clothing and carpets, and the improvements to the building put in by him," etc. Then follows this clause: "The assured has permission to use naphtha in his business, but fire or lights are not permitted in the building, except a small stove in office." At that time there was no other stove in the building. The policy issued July 7, 1877, for one year. About the 1st of January following a large stove was placed in a room used for a drying room, and was thereafter used in connection with hot-water wipes for warm-

ing the naphtha in tanks in the basement. The fire was in April, caused by an explosion of gas.

The court charged the jury as follows: "The defendant claims that the plaintiff put in a stove and other apparatus after the policy was issued, without the consent of the company, and that this materially increased the risk. Now if this was done, and materially increased the risk, it vitiated the policy. You are to decide whether putting in that additional stove and apparatus, and using it, increased the risk. The question is whether there would be more likelihood of danger from two stoves, with the pipes for heating naphtha, than from one stove."

It was conceded that the additional stove was used in the manner and for the purpose stated, and that the use of naphtha caused an accumulation of highly inflammable gas in the room where the stove was. The defendants chose to insure property in a building in which there should be but one small stove, and that definitely located in as safe a place probably as there was in the building. By strong implication the use of any other stove was prohibited. We must presume that the defendants would have refused to insure with liberty to use two stoves in the manner they were used at the time of the fire. It will not do to say that they insured business carried on with naphtha and that, therefore, the insured had a right to use the ordinary means for carrying on that business. The conditions and manner of use were clearly defined and limited, to which he agreed, and he had no right to use means which involved a violation of his agreement. Nor was it necessary; for obviously the naphtha could have been heated by means of steam or hot-water pipes from a fire at a safe distance.

But the plaintiff says that it is not expressed in the policy that the use of another stove shall make it void, and, therefore, that such use is not of itself a defense. It may be true that such use, irrespective of the increase of risk, will not have that effect; but the policy in another part expressly provides that if the risk is increased it shall be void; so that the real question was whether the additional stove increased the risk. The court correctly instructed the jury that, if it did, the plaintiff could not recover. The jury, therefore, must have

found that the risk was not increased. There was no evidence to justify such a finding. The testimony the other way was clear and conclusive.

In addition to the obvious danger from the use of such materials, two witnesses, familiar with the business of insurance, testified unqualifiedly that the use of the additional stove materially increased the risk and rendered this uninsurable; and there was no conflicting evidence. It seems very clear that the jury must have disregarded the evidence.

The case is not met by the suggestion that there was evidence tending to show that the fire caught from the office stove. The difficulty reaches back of that. The defendants not only did not insure against the risk of two stoves, but virtually refused to insure at all if the premises were subjected to that additional risk. They had a right to refuse insurance in a case in which the question would be an open one whether a loss was occasioned by a risk insured against or one that was not insured against. The difficulty of proving the origin of a fire, to say nothing of the inclination of juries to find against corporations, is a sufficient reason for the exercise of the right; and when a party has clearly exercised the right, as the defendants have in the present case, the court ought not to deprive him of the benefit of it by a strained interpretation of the policy. Nor is the plaintiff's claim a tenable one, that the policy continued in force during the term for which it issued, notwithstanding the increased risk, by virtue of the eleventh condition in the policy. That condition provided for a renewal of the policy at the expiration of the term, and then adds: "But in case there shall have been any change in the risk, either within itself or by neighboring buildings, not made known to the company by the assured at the time of renewal, this policy and renewal shall be void."

It is obvious that this is not inconsistent with the first condition, which provides that the increased risk shall avoid the policy, nor was it intended to modify that condition, but was intended to extend it to the renewal, in case one should happen to issue in ignorance of the increased risk.

Feeling constrained, as we do, to grant a new trial for the reason given above, it is unnecessary to consider the other questions raised by the motion.

In this opinion the other judges concurred.

G. G. Sill and J. H. Tallman, with whom was G. Case, for the plaintiff.

C. E. Perkins for the defendants.

COMMUNICATIONS.

NAPPER v. YAGER.

Louisville, Ky., July 18, 1881.

Editors Kentucky Law Reporter: With all due deference to the learned court which rendered the judgment in *Napper v. Yager*, reported in the July number of *The Kentucky Law Reporter*, it seems to me that your dissent from the opinion in that case is well conceived.

It was once the writer's fortune to successfully maintain before Judge Grace, of the Second District, the proposition that, since the adoption of the Civil Code, a judgment and return of *nulla bona* were not necessary to the maintenance of a suit in equity to subject property fraudulently conveyed by a debtor. In the investigation, however, the writer found that the only plausible ground upon which the contrary doctrine could be maintained was the old notion that no one was, in the technical sense, a 'creditor' until after he had obtained a judgment.

In order to remove this difficulty he prepared and introduced into the legislature the act of March 6, 1872 (1 volume Acts. 1871-'2, page 44), which defined a creditor to be any person having a bona fide claim against another, whether a judgment had been obtained upon it or not. This act was not repealed by the General Statutes, and, however it may now be construed, the object of the writer of that act in securing its passage was to meet just such cases as *Napper v. Yager*.

The decision in that case is also directly in conflict with a MSS. opinion of the same learned court cited in the notes to Bullitt's Code. W. E.

The act referred to in the above communication is as follows:

"An act to define the meaning of the word creditor, as used in the Revised Statutes and Civil Code of Practice, and in acts amendatory thereof.

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"Section 1. That the word creditor, as used in the Revised Statutes and Civil Code of Practice, and in acts amendatory thereof, shall be construed to mean and include all persons having a bona fide debt or claim against another, whether judgment has been rendered on the same or not.

"Section 2. This act to take effect from and after passage."

Approved March 6, 1872.

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UNITED STATES CIRCUIT COURT.
For the Sixth Circuit and District of Kentucky.

PEPPER v. LABROT & GRAHAM.

(Filed October 23, 1880.)

Labrot & Graham have the exclusive lawful right to use their brand :

* *

OLD OSCAR PEPPER
Distillery,
Established 1838,
Hand-Made Sour-Mash,
LABROT & GRAHAM,
Proprietors,
Woodford County, Ky.,
* *

as the owners of the "Old Oscar Pepper Distillery" in Woodford county, Ky., as describing the whisky made by them as the product of said distillery, and James E. Pepper is enjoined from using a similar brand, copied in the opinion of the court herein, as describing whisky made by him at another distillery.

Opinion of the court by Mr. Justice Matthews.

This is a bill in equity, filed October 23, 1880, the complainant being a citizen of the State of New York, and the defendants citizens of Kentucky. It is alleged that both parties are and have been engaged in the manufacture and sale of whisky.

The complainant claims to be the originator, inventor and owner of a certain trade-mark and brand for whisky made by

him, consisting of the words "Old Oscar Pepper," and also of an abbreviation thereof consisting of the letters "O. O. P." He also alleges that the said words and letters were and are a fanciful and arbitrary title and trade-mark and brand, intended to designate and identify whisky of his manufacture, the use of which he began in 1874, continued since, by branding and marking the words on each barrel, and using the letters as an abbreviation in correspondence and contracts concerning the article, the whisky so designated having acquired that name and being well and favorably known thereby. He says that the said words and trade-mark were made up in part of the family name of the complainant, and embodied the name of his father, and had never before been so used.

He avers that the whisky made by him and so branded, marked, and known, was very carefully manufactured, and of excellent quality, and of great reputation in the market, commanding a ready sale at profitable prices, and was identified by said trade-mark as the complainant's make, whereby the said trade-mark has become of great value to him. He alleges that the trade-mark, "Old Oscar Pepper," was used by him by burning the same upon and into the heads of barrels containing whisky made by him, in a form set out as an exhibit to the bill. A copy is here set out as follows:

* *

OLD OSCAR PEPPER
DISTILLERY.
Hand-made Sour-Mash,
JAS. E. PEPPER,
Proprietor.
Woodford County, Ky.
* *

The same device on a smaller scale was printed upon the letter-heads, bill-heads and business cards used by him in the correspondence and other business concerning his whisky; and was also attached to and pasted upon all small packages and samples of the whisky made by him, and was used to identify, and was universally recognized as identifying, the whisky made by him.

On November 13, 1877, the complainant procured a certificate of the registration of said trade-mark under the laws of the United States.

The bill charges that the defendants have sought to appropriate the complainant's trade-mark to their own use, and are using upon barrels of whisky made by them a similar device, a copy of which is exhibited. It is as follows:

.....
OLD OSCAR PEPPER
Distillery,
Established 1838.
Hand-made Sour Mash.
LABROT & GRAHAM,
Proprietors.
Woodford County, Ky.
.....

It is alleged that this is done by the defendants with the wrongful and fraudulent design to procure the custom and trade of persons who are, or have been, in the habit of buying, vending or using the genuine whisky made by the complainant, and of illegally and fraudulently promoting the introduction and sale of the defendant's own whisky under the cover and reputation of the complainant's trade-mark, and of inducing unsuspecting persons to purchase the whiskies of defendants as and for the genuine "Old Oscar Pepper" whisky manufactured by the complainant. It is charged also that, with like intent, the defendants are using the same device and trade-mark upon their letter heads and business cards and other papers and advertisements, and upon packages containing their whisky.

It is also charged that this conduct of the defendants is injurious to the complainant in the sale of his whisky and in the profits thereof, and that by reason of the inferior quality of the whisky sold by defendants under such trade-mark the reputation of the complainant's whisky is greatly prejudiced and injured in the markets of the country, and a fraud and deception practiced upon the public, many of whom are induced to purchase the defendants' whisky believing it to be the manufacture of the complainant.

The bill accordingly prays for an injunction and an account.

The defendants filed an answer, in which they admit that they have been, and are, engaged in manufacturing and selling whisky, their distillery being in Woodford county, Kentucky, and long known and designated as the "Old Oscar Pepper Dis-

tillery." They deny that the complainant is the originator or owner of the trade-mark or brand for whisky made by him, as claimed, and deny that the words "Old Oscar Pepper," or the abbreviation of them by the letters "O. O. P.," have ever been used as an arbitrary or fanciful title or trade-mark for whisky, or that they were ever so used by the complainant, and allege that they were never used by him except in connection with the word "distillery," and then only for the purpose of showing that the whisky, in reference to which they were so used, was manufactured at, and was the product of, the Old Oscar Pepper Distillery. The defendants claim that the use of the same by the complainant as a brand for his whisky, manufactured elsewhere, would be a fraud on the public as well as on the defendants.

They say that several years since the complainant became the owner of thirty-three acres of land in Woodford county, Kentucky, known as the land used by Oscar Pepper for distillery purposes, upon which there was a distillery and machinery, warehouse and other improvements; that said distillery during the lifetime of Oscar Pepper, the father of the complainant, became famous because of the superior quality of the whisky there produced, which was attributed by dealers in whisky to the peculiar character and properties of the water used in the process of distillation; that in 1874 the complainant, in company with one E. H. Taylor, Jr., with whom he was associated in business, operated said distillery and formally named it the "Old Oscar Pepper Distillery," and procured a large number of iron signs to be made and distributed throughout the country containing a correct drawing of the distillery and warehouse buildings, and an accurate view of the old Oscar Pepper homestead or dwelling, which drawing and view they surrounded with the words, in a circular form, above the same, "Old Oscar Pepper Distillery," and below, in a straight line, "Woodford Co., Kentucky," and thus, as is claimed, fixed and determined the name of said distillery.

They also procured an iron brand to be made, and with it burned into the head of each barrel of whisky manufactured in said distillery the words:

* *

OLD OSCAR PEPPER
Distillery.
Hand-made Sour-Mash.
JAS. E. PEPPER,
Proprietor.
Woodford County, Ky.

* *

for the purpose, as is alleged, of identifying it as the product of the Old Oscar Pepper Distillery. It is also alleged that the complainant advertised his business in a circular, as follows:

"Having put in the most thorough running order the old distillery premises of my father, the late Oscar Pepper (now owned by me), I offer to the first-class trade of this country a hand-made, sour-mash, pure copper whisky of perfect excellence. The celebrity attained by the whisky made by my father was ascribable to the excellent water used (a very superior spring), and the grain grown on the farm adjoining by himself, and to the process observed by James Crow, and after his death by Wm. F. Mitchell, his distiller. I am now running the distillery with the same distiller, the same water, the same formulas, and grain grown upon the same farm."

He also circulated a similar certificate from his distiller, Mitchell, who said:

"I am employed by James E. Pepper as distiller, and the whisky I now make is from the same formulas the celebrated Crow whisky, manufactured by James Crow and myself for his father (the late Oscar Pepper), at the same place, and is of the same excellence, being identical in quality. I use the same water, the same grain, the same still."

It is also alleged that the complainant, in March, 1877, was declared a bankrupt, and that, among other assets, the tract of land and the distillery thereon, with all the appurtenances and fixtures, were sold by the assignee, and by mesne conveyances became vested in the defendants, who have since operated the same by the manufacture of whisky; and that the complainant in the meantime has been, and is now, operating a distillery in Fayette county, Kentucky, as the sole place of the manufacture of his whisky, and that, consequently, he can not use the brand formerly used by him while operating the Old Oscar Pepper Distillery without making a false and fraudulent representation as to the place of manufacture.

The defendants admit that since they have owned and operated the Old Oscar Pepper Distillery they have used the brand set out in the pleadings, but merely for the purpose of identifying their whisky as the product of that distillery, as follows:

OLD OSCAR PEPPER
Distillery,
Established 1838.
Hand-made Sour-Mash.
LABROT & GRAHAM,
Proprietors,
Woodford County, Ky.

They claim the right so to do by virtue of their ownership of the distillery, of which they say that is the proper name.

On November 28, 1880, the defendants also filed their cross bill, setting up in substance the same facts, and claiming that they are entitled to the exclusive use as a trade-mark of the brand described in the pleadings as used by them, and praying to be protected therein by a perpetual injunction.

To this cross bill the complainant filed his answer, insisting upon his claim to the injunction and right to the exclusive use of the trade-mark "Old Oscar Pepper," and the abbreviation "O. O. P.," as applied to whisky. He alleges that his father during his lifetime, Oscar Pepper, operated a distillery on the premises mentioned, and manufactured an article which became well and favorably known to the trade as "Crow," or "Old Crow" whisky, from the name of the distiller, and that, in consequence, the distillery became known as the Old Crow Distillery; that after his father's death the distillery tract having come into his possession, he leased it to W. A. Gaines & Co., who continued the manufacture of whisky under the same trade name and mark of Crow or Old Crow; but that afterward the complainant, having gone into the business himself, built on the same site an entirely new distillery and manufactured whisky which he called by the name of Old Oscar Pepper, and so marked and branded the packages, and thereby originated and adopted it as his trade-mark to identify and distinguish the whisky made by him, and it became well and favorably known as such.

He says that in the manufacture of his whisky he used neither the same distillery building at which the "Crow" whisky was made, nor the identical spring of water which had been used in connection with it, but another spring in the same vicinity of the same quality, all the springs of water in

the same geological formation throughout the counties of Woodford, Fayette, Bourbon, Harrison and the blue grass section of Kentucky being substantially alike in quality, and the whisky made from one is indistinguishable from that made with equal care and skill by the same process at any other.

And the complainant insists that the name "Old Oscar Pepper" was never applied to the distilling premises until after he had adopted it as the name of whisky made by him, and then only as indicating the place where he made his "Old Oscar Pepper" whisky, and that it was not the name of the distillery which was applied to designate the whisky made then, but the name of the whisky which was applied to designate the distillery at which it was made, so far as it was ever known or called. He charges that the use by the defendants of the words "Old Oscar Pepper Distillery," as descriptive of the locality, is a subterfuge and evasion, their real intent being to use the words as describing their make of whisky, and thereby wrongfully to use complainant's trade-mark and rate his trade.

General replications perfect the issues arising, both on the original and cross bill, and the cause has been submitted on final hearing upon the pleadings and proofs.

It is manifest that the controversy between the parties in the first instance is one of fact.

The contention of the complainant is that the words "Old Oscar Pepper," and the abbreviation of them, "O. O. P.," constitute a brand or mark originally adopted by him to designate whisky made by him, without reference to the place of manufacture, and that by use and recognition it has become associated in the minds of dealers and the public with the article made by him, so as to constitute its name in the trade, whereby to distinguish it from a similar article made by any and all others.

On the other hand, the defendants claimed that the words in question were originally used, and their use subsequently continued, merely to designate the fact that the whisky contained in the packages so marked, or spoken of in advertisements, circulars, signs, etc., on which the mark was burned or printed, was made at the distillery so designated, and that

that was done because the distillery, or its predecessor on the same site, had acquired a reputation in connection with the manufacture of whisky which was sufficient to recommend any article made at the same place.

Undoubtedly the inference from the plain meaning of the words themselves supports strongly the claim on the part of the defendants.

The complainant's brand or make, as claimed and used by him, is "Old Oscar Pepper Distillery, Woodford county, Ky., James E. Pepper, Proprietor." The words "hand-made sour-mash" describe the quality of the whisky; and as to the rest the plain and unequivocal meaning is that it is the product of the "Old Oscar Pepper Distillery," of which James E. Pepper is proprietor.

The complainant in his testimony endeavors to explain his use of the word "distillery" in this connection so as to make its use consistent with his claim that the words "Old Oscar Pepper" were intended to denominate the whisky, and not the distillery. He says: "In branding the ends of my barrels I put the word 'distillery' to show that the 'Old Oscar Pepper' whisky was a straight whisky, made by me at my own distillery, and not a compounded whisky, and the use of the word 'distillery' on the head of the barrels following the trade-mark indicates a straight whisky as distinguished from a compounded whisky."

But this explanation does not seem sufficient. The use of the word "distillery" does indeed seem to advertise the fact that the whisky is distilled and not rectified, but it does so by designating the spirits contained in the package as the product, not merely of a distillery, but of the particular distillery known as the "Old Oscar Pepper Distillery," of which James E. Pepper is proprietor.

It is true that Beecher, one of the firm of Ives, Beecher & Co., the merchants who sold the complainant's whisky in New York, testified that the whisky acquired its reputation under the name of "Old Oscar Pepper," or "O. O. P." whisky, and was known by that name, and inquired after and bought and sold by that designation. He says: "My firm buy whisky

under the name 'Old Oscar Pepper.''' But he immediately explains that "we buy as 'Old Oscar Pepper' whisky, to be made at the distillery where James E. Pepper first made the whisky known to the trade by that name." (Answer to twenty-third interrogatory.) And in answer to the seventh cross interrogatory he says: "At the time my firm commenced dealing in 'Old Oscar Pepper' whisky that name added to the reputation and saleability of the whisky, for the reason that that was the name of James E. Pepper's father, and his father had made good whisky at that same distillery for several years previous to the making of any by James E. Pepper."

It is beyond dispute that Ives, Beecher & Co. introduced the complainants' manufacture of whisky to the trade under the name of Old Oscar Pepper Whiskys upon the credit of the old distillery of Oscar Pepper, and recommended them as of superior excellence because they were the product of that distillery. This was done by advertisements in circulars, containing certificates and affidavits, one from James E. Pepper himself, that he had put in the most thorough running order "the old distillery of my father, the late Oscar Pepper, now owned by me;" that "the celebrity attained by the whisky made by my father was ascribable to the excellent water used (a very superior spring) and the grain grown on the farm adjoining by himself, and the process observed by James Crow, after his death by W. F. Mitchell, his distiller;" that "I am now running the distillery with the same distiller, the same water, the same formula, and grain grown upon the same farm; consequently my product being of same quality and excellence."

Another certificate and affidavit so published was from his mother, in which she stated that her son, James E. Pepper, is the owner of the old distillery property, situated in the county of Woodford, State of Kentucky, formerly owned by her deceased husband, Oscar Pepper, and known as the "Old Crow" distillery. "The buildings have been thoroughly improved. Mr. W. F. Mitchell, who distilled for the late Oscar Pepper, succeeding James Crow, is employed by my son, and the product is of the highest excellence, and recognized as fully up to the standard of the celebrated old product from the same stills."

And the distiller, Mitchell, also certifies: "I use the same water, the same grain and the same still."

It does not avail the complainant now to repudiate these representations, or to insist that they are altogether immaterial. It may be true, as he now says, that in point of fact his distillery was altogether distinct, as a building and machinery, from that so long operated by his father, and that he did not use the same spring of water and the same still; and it may be equally true that, so far as the intrinsic quality of the whisky is concerned, the circumstances referred to were altogether unimportant, for the reason that the product of equally good materials, made in the same geological region, in the best manner known to those engaged there in the manufacture, could not be distinguished from the favorite article known by the name of any particular distillery. Nevertheless it remains quite certain from the proofs in the case that the complainant succeeded in establishing a market for his manufacture upon the special belief of the public that it must be like that made by his father, because made at the same locality, and with all the advantages that was thought to confer. In other words, he sought and obtained for his own manufacture, by the use of the name of his father's distillery, the reputation established by Oscar Pepper for his own.

Oscar Pepper manufactured whisky at his distillery for many years previous to his death in 1865, probably as early as 1838, and the distillery was known in the neighborhood, as some witnesses testify, as Oscar Pepper's distillery. This, indeed, would be most natural.

Afterwards the whisky distilled there under the management of James Crow became extensively and favorably known as "Old Crow" whisky, and the distillery acquired the name of the Old Crow Distillery, and that name was used after the death of Oscar Pepper by successive lessees of the establishment as a trade-mark to designate its production; but during that period the name of Oscar Pepper, as formerly connected with it, appeared in the brands and marks, as appears in those used by Gaines, Berry & Co. while they were carrying it on.

They styled themselves on business cards "Lessees of Oscar Pepper's Old Crow Distillery."

In 1874, the trade-mark of "Old Crow" having previously by Gaines been transferred to the product of another distillery owned and operated by him or his firm, the complainant came into possession of his own distillery, and it became known as the Old Oscar Pepper Distillery. The deed directly to the complainant of the distillery premises, made by a commissioner in pursuance of a decree for partition, refers to an accompanying plat, in which the "Old Crow Distillery" is designated; but early in 1875 an agreement was made by the complainant with one E. H. Taylor, Jr., reciting that the former was owner of the premises upon which is situated the old distillery which was operated and run by the said Oscar Pepper in his lifetime, and providing means for a thorough reparation of said old distillery, and of operating the same for the purpose of manufacturing copper whisky of the grade, character and description of that which was made by the said Oscar Pepper in his lifetime, when James Crow and W. F. Mitchell were his distillers.

The complainant having, upon his own petition, been declared a bankrupt, filed the required schedules of his assets and liabilities, in which he described the tract of land inherited from his brother as including the "Old Oscar Pepper Distillery," and as such it was known at the time the title became vested in the defendants.

The clear result of the whole evidence seems, in our opinion, to be that the complainant adopted the name of the "Old Oscar Pepper Distillery" as the name of his distillery, in order that the whisky manufactured by him there might have the reputation and whatever other advantage to result from that association.

That distillery having now become the property of the defendants, by purchase from the complainant, can they be denied the right of using the name by which it was previously known in the prosecution of the business of operating it and of describing the whisky made by them as its product?

Can the complainant be permitted to use the brand or mark formerly employed by him to represent whisky made by him elsewhere as the actual product of this distillery?

Both these questions, in our opinion, must be answered in the negative.

The most recent statement of the law applicable to this subject by the Supreme Court of the United States is found in the case of the *Amoskeag Manufacturing Co. v. Trainer*, 101 U. S., 51. In that case Mr. Justice Field said:

"The general doctrine of the law as to trade-marks, the symbols or signs which may be used to designate products of a particular manufacture, and the protection which the courts will afford to those who originally appropriated them, are not controverted. Every one is at liberty to affix to a product of his own manufacture any symbol or device not previously appropriated which will distinguish it from articles of the same general nature manufactured or sold by others, and thus secure to himself the benefits of increased sale by reason of any peculiar excellence he may have given to it.

"The symbol or device thus becomes a sign to the public of the origin of the goods to which it is attached, and an assurance that they are the genuine article of the original producer. In this way it often proves to be of great value to the manufacturer in preventing the substitution and sale of an inferior and different article for his products. It becomes his trade-mark, and the courts will protect him in its exclusive use, either by the imposition of damages for its wrongful appropriation or by restraining others from applying it to their goods, and compelling them to account for profits made on a sale of goods marked with it.

"The limitations upon the use of devices as trade-marks are well defined. The object of the trade-mark is to indicate, either by its own meaning or by association, the origin in ownership of the article to which it is applied. If it did not it would serve no useful purpose either to the manufacture or to the public; it would afford no protection to either against the sale of a spurious in place of the genuine article. This object of the trade-mark, and the consequent limitations upon its use, are stated with great clearness in the case of *Canal Co. v. Clark*, 13th Wallace, —."

Then the court said, speaking through Mr. Justice Strong, that "no one can claim protection for the exclusive use of a trade-mark or trade-name which would practically give him a monopoly in the sale of any goods other than those produced and made by himself. If he could, the public would be injured rather than protected, for competition would be destroyed. Nor can a generic name, a name merely descriptive of an article of trade, of its qualities, ingredients and characteristics, be employed as a trade-mark, and the exclusive use of it be entitled to legal protection."

In the case of *Canal Co. v. Clark*, 13 Wall., 322, it is stated that "the office of a trade-mark is to point out distinctively the origin or ownership of the article to which it is affixed; or, in other words, to give notice who was the producer." And that there are some limits to the right of selection will be manifest, it is further said in that case. "when it is considered that in all cases, when rights to the exclusive use of a trade-mark are invaded, it is invariably held that the essence of the wrong consists in the sale of the goods of one manufactured or branded as those of another; and that it is only when this false representation is directly or indirectly made that the party who appeals to a court of equity can have relief. This is the doctrine of all the authorities.

"And it is obvious that the same reasons," continues the opinion in that case, "which forbid the exclusive appropriation of generic names or of those merely descriptive of the article manufactured, and which can be employed with truth by other manufacturers, apply with equal force to the appropriation of geographical names designating districts of country. Their nature is such that they can not point to the origin (personal origin) or ownership of the articles of trade to which they may be applied. They point only at the place of production, not to the producer, and could they be appropriated exclusively the appropriation would result in mischievous monopolies."

In the same opinion Mr. Justice Strong quotes with approval an extract from the opinion in the case of the *Amoskeag Manufacturing Co. v. Spear*, 2 Sanford Sup. Ct., 509, as follows:

"The owner of an original trade-mark has an undoubted right to be protected in the exclusive use of all the marks, forms or symbols that were appropriated as designating the true origin or ownership of the article or fabric to which they are affixed; but he has no right to the exclusive use of any words, letters, figures or symbols which have no relation to the origin or ownership of the goods, but are only meant to indicate their names or quality. He has no right to appropriate a sign or symbol which, from the nature of the fact it is used to signify, others may employ with equal truth, and, therefore, have an equal right to employ for the same purpose."

Following and applying the principle expressed in the last sentence of this extract Mr. Justice Strong, in the opinion from which we are still quoting, says:

"It is only when the adoption or imitation of what is claimed to be a trade-mark amounts to a false representation, express or implied, designed or incidental, that there is any title to relief against it. True, it may be that the use by a second producer, in describing truthfully his product, of a name or a combination of words already in use by another, may have the effect of causing the public to mistake as to the origin or ownership of the product, but if it is just as true in its application to his goods as it is to those of another who first applied it, and who, therefore, claims an exclusive right to use it, there is no legal or moral wrong done. Purchasers may be mistaken, but they are not deceived by false representations, and equity will not enjoin against telling the truth."

Tried by these principles, it would seem that the trade-mark claimed by the complainant can not be sustained as such a designation of whisky manufactured by him, without reference to the place of its production, and that it is not, therefore, a lawful trade-mark at all, in the proper sense of that term. It is rather the trade name of the distillery itself, of which he was at one time the proprietor, but which is now the property of the defendants. Neither by its own meaning nor by association does it indicate the personal origin or ownership of the article to which it is affixed. It does not serve to give notice who was the producer. It could be applied by him with

truth to his goods only while he was the owner of the distillery named and then only not to all whisky of his manufacture, but only to that actually produced at that distillery. It can now be used without practicing a deception upon the public only by the defendants. It points only at the place of production, not to the producer. If a trade-mark at all, in any lawful sense, it is only in its use in connection with the article which it truthfully describes, that is, whisky which is actually manufactured at the Old Oscar Pepper Distillery, in Woodford county.

In the case of *Hall v. Barrows*, 4 DeGex, Jones & Smith, 157, there was a trade-mark, altogether distinct from the name of the works, being the initials of the names of two of the original firms which owned the works stamped upon the iron produced at the works. The question was whether, in a sale of the works and business to a surviving partner the trade-marks should be valued as property in the sale. The lord chancellor, Westbury, said: "There is nothing in the answer or evidence to show that the iron marked with these initials has, or ever had, a reputation in the market, because it was believed to be the actual manufacture of one of the two original firms. Now if I adopted the distinction drawn by the master of the rolls, between local and personal trade-marks, I should be more inclined to treat this mark as incident to the possession of the Bloomfield Ironworks, for it has been used by successive owners of such works, and seems to have been used by the last partnership in no other right. In this respect the case resembles that of *Motley v. Downman*, 3 Myl. & Cr., 1.

"But it is unnecessary to pursue this further, for I am of the opinion that these initial letters surrounded by crown have become, and are, a trade-mark, properly so called, that is, a brand which has reputation and currency in the market as a well-known sign of quality, and that as such is a valuable property of the partnership as an addition to the Bloomfield works, and may be properly sold with the works, and, therefore, properly included as a distinct subject of value in the valuation to the surviving partner.

"It must be recollected that the question before me is simply whether the right to use the trade-mark can be sold along with the business and ironworks, so as to deprive the surviving partner of any right to use the mark in case he should set up a similar business. Nothing that I have said is intended to lead to the conclusion that the business and ironworks might be put up for sale by the court in one lot, and that the right to use the trade-mark might be put up as a separate lot, and that one lot might be sold and transferred to one person and the other lot sold and transferred to another, the case requiring only that I should decide that the exclusive right to this trade-mark belongs to the partnership as part of its property, and might be sold with the business and works and as a valuable right, and if it might be so sold it must be included in the valuation to the surviving partner."

It will be observed with what pains the lord chancellor guards against the conclusion that even in such a case the title to the trade-mark could be separated from that of the establishment, upon the product of which it had always been sold, were when the trade-mark was not the mere name of the place of manufacture, but a trade-mark proper, denoting the personal origin of the manufactured article.

The case of *Kidd v. Johnson*, 100 U. S. Rep., 617, is to the like effect. The trade-mark in that case—"S. N. Pike's Magnolia Whisky, Cincinnati, O."—was a trade-mark proper: that is, indicated the personal origin of the manufacture, and was not the mere name of the place of manufacture. Pike sold his establishment to be carried on for the same business by his successors, and with it the right to use his brands. The court said, in deciding the case (page 620): "As to the right of Pike to dispose of his trade-mark in connection with the establishment where the liquor was manufactured we do not think there can be any reasonable doubt. It is true the primary object of a trade-mark is to indicate by its meaning or association the origin of the article to which it is affixed. As distinct property, separate from the article created by the original producer or manufacturer, it may not be the subject of sale. But when the trade-mark is affixed to articles manufactured at a particular establishment and acquires a special reputation in

connection with the place of manufacture, and that establishment is transferred, either by contract or operation of law, to others, the right to the use of the trade-mark may be lawfully transferred with it. Its subsequent use by the person to whom the establishment is transferred is considered as only indicating that the goods to which it is affixed are manufactured at the same place, and are of the same character as those to which the mark was attached by its original designer. Such is the purport of the language of Lord Cranworth in the case of *Leather Cloth Co. v. American Leather Cloth Co.*, 11 Jur. N. S., 513; *Ainsworth v. Walmesley*, 44 L. J., 355; *Hall v. Barrows*, 10 Jur. N. S., 35."

The observations of Lord Cranworth in the leather cloth case, referred to in this citation, are as follows:

"But I further think that the right to a trade-mark may in general, treating it as property or as an accessory of property, be sold and transferred upon a sale and transfer of the manufactory of the goods on which the mark has been used to be affixed, and may be lawfully used by the purchaser. Difficulties, however, may arise where the trade-mark consists merely of the name of the manufacturer. When he dies those who succeed him, grandchildren or married daughters, for instance, though they may not bear the same name, yet ordinarily continue to use the original name as a trade-mark, and they would be protected against any infringement of the exclusive right to that mark. They would be so protected because, according to the usages of trade, they would be understood as meaning no more by the use of their grandfather's or father's name than that they were carrying on the manufacture formerly carried on by him. Nor would the case be necessarily different if, instead of passing into other hands by devolution of law, the manufactory were sold and assigned to a purchaser. The question in every such case must be whether the purchaser, in continuing the use of the original trade-mark, would, according to the ordinary usages of trade, be understood as saying more than that he was carrying on the same business as had been formerly carried on by the person whose name constituted the trade-mark. In such a case, I see nothing to

make it improper for the purchaser to use the old trade-mark, as the mark would in such a case indicate only that the goods so marked were made at the manufactory which he had purchased."

In the foregoing cases the trade-mark consisted either in some arbitrary and fanciful name given to the product, or in the name or initials of the original producer, and it was held, even in respect to them, that the exclusive right to continue their use might pass to a purchaser of the place of production, carrying on the business of producing the same article. It is a fair inference from these authorities, that where, as in the present case, the trade-mark consists merely in the name of the establishment itself where the manufacture is carried on, and becomes attached to the manufactured article only as the product of that particular establishment, a sale of the establishment will carry with it to the purchaser the exclusive right to use the name it had previously acquired in connection with his own manufacture at the same place of a similar article by operation of law. For that proposition the case of the Congress Spring, Cox's American Trade-mark Cases, 599, is a direct authority. The Court of Appeals, per Folger, J. (page 630), said: "The plaintiffs purchased of the former proprietor the Spring. They took the whole property in it. They thus obtained that which was the prime value of it, the exclusive right to preserve its waters in bottles as an article of merchandise, and the exclusive right to sell it when bottled. Thus they acquired the business of their predecessors, for the plaintiffs owning the spring no one else could carry on the business. And under the rules above stated they acquired by assignment or operation of law the right to the trade-mark before that in use to designate the article upon which this business was carried on."

It is true, as observed by counsel in argument, that, in that case, the article of merchandise was a natural, and not, as in the present, an artificial production. The circumstance was observed upon in the argument of that case as a reason for refusing the protection claimed for the trade-mark by the purchaser. The court said in reply (page 625): "It is true that in most of the cases which have been the occasion of the rules laid down on this subject, the article in question has been arti-

ficial. But it will be difficult to show a reason for any of these rules which does not apply to the proprietorship of an unique product of nature as well as to that of an unique product of art."

The following cases are cited without comment as sustaining the same proposition: *G. & H. Man. Co. v. Hall*, 61 New York, 229; *Carmichael v. Lattimer*, 11 Rhode Island, 407, and *Booth v. Jarrett*, 52 How. Pr. Rep., 169.

The cases cited and relied upon by counsel for complainant do not seem to us to affect the question in the view which we have taken of the facts. The only one upon which we think it important to submit a comment is that of *Witherspoon v. Currie*, L. R., 5 Eng. and Jr., Ap., 521, and that only because it seems to be urged as inconsistent with the view we have been compelled to adopt. In that case the controversy turned upon the exclusive right to the word "Glenfield" as applied to starch, originally made at a village of that name, the manufacture of which was subsequently removed to another place, as against the defendant subsequently manufacturing at the original place, Glenfield, and claiming on that account the right to use the name in connection with the starch made by him. Lord Westbury stated the point on which the final decision in favor of the complainant was rested with clearness. He said: "I take it to be clear from the evidence that long antecedently] to the operations of the respondent the word 'Glenfield' had acquired a secondary signification or meaning in connection] with a particular manufacture—in short, it had become the trade denomination of the starch made by the appellant. It was wholly taken out of its ordinary meaning, and in connection with starch had acquired that peculiar secondary signification to which I have referred. The word 'Glenfield,' therefore, as a denomination of starch, had become the property of the appellants. It was their right and title in connection with the starch."

We do not find in the present case any state of facts corresponding with] this. The words "Old Oscar Pepper Distillery" never lost their primary signification and never acquired any secondary] meaning. And, as applied to the whisky made by

the complainant, the words "Old Oscar Pepper" and their abbreviation "O. O. P." never came to mean more than whisky that had been made at that particular distillery. They did not become a denomination of whisky, as the manufacture of the complainant or of any person, but characterized it only as entitled to public favor by reason of the reputation of the particular distillery at which it purported to have been made.

For these reasons we are of opinion that the equity of the case, both upon the original and cross bills, is with the defendants. A decree may be entered accordingly.

UNITED STATES SUPREME COURT.

(No. 192—October Term, 1880.)

BARNEY, &c. v. LATHAM, &c.

1. The entire suit is removed from the State to the U. S. Circuit Court under the second clause of the second section of the act of March 3, 1875, to-wit:

"When in any suit mentioned in this section there shall be a controversy, which is wholly between citizens of different States and which can be fully determined as between them, then either one or more of the plaintiffs or defendants, actually interested in such controversy, may remove said suit to the circuit court of the United States for the proper district."

2. The entire suit is removed under said section when one or more of the parties actually interested in a separable controversy files the proper petition and bond for removal.

3. The right to remove the entire suit is not affected by the fact that a defendant, who is a citizen of the same State with one of the plaintiffs, may be a proper, but is not an indispensable, party to such separable controversy between the citizens of different States.

Appeal from the Circuit Court of the United States for the District of Minnesota.

Opinion of the court by Mr. Justice Harlan.

This case involves the construction of the second clause of the second section of the act of March 3, 1875, chapter 137, determining the jurisdiction of the circuit court of the United States, and regulating the removal of causes from the State courts.

It was commenced by a complaint filed in one of the courts of the State of Minnesota. The plaintiffs are William H. Latham and Edward P. Latham, citizens, respectively, of Minnesota and Indiana. The defendants are Ashbel H. Barney, Jesse Hoyt, Alfred M. Hoyt, Samuel N. Hoyt, Wm. G. Fargo, N. C. Barney, Charles Barney, citizens of New York; Angus Smith, a citizen of Wisconsin; Benjamin P. Cheney, a citizen of Massachusetts; and the Winona and St. Peter Land Co., a corporation organized under the laws of Minnesota.

The complaint is very lengthy in its statement of the grounds upon which the suit proceeds, but the facts, so far as it is necessary to state them, are these:

The Territory and State of Minnesota received, under various acts of Congress, lands to aid in the construction of railroads within its limits. (Act of March 3, 1857, 11 Stat., 192; act of March 3, 1865, 13 Stat., 526; act of July 13, 1866, 14 Stat., 97.) The benefit of the grants from the government was transferred by the State to the Winona and St. Peter Railroad Co., a corporation created under its own laws, with authority to construct a road from Winona westerly by way of St. Peter in that State.

Prior to October 31, 1867, the individual defendants already named (except N. C. Barney and Charles T. Barney), together with Charles F. Latham and Danforth N. Barney (both of whom died before the commencement of this suit) had, under contract between them and that company, constructed one hundred and five miles of the proposed road, whereby the latter became entitled to several hundred thousand acres of the lands granted by congress to the State. On the day last named those persons entered into a written contract with the company, whereby the latter, among other things, agreed, in consideration of its indebtedness to the former, to sell and convey to them such lands as it should receive from the State by reason of the construction of the one hundred and five miles of road, excepting so much thereof as was necessary for tracks, right of way, depot grounds, and other purposes incidental to the operation of the railroad. Of the moneys advanced and

used in construction Charles F. Latham contributed one thirty-seventh, and to that extent, it is claimed, he was entitled in equity to an undivided one thirty-seventh of the lands earned. The company, prior to October, 1870, received from the State conveyances of lands to the extent of 364,154 acres, which quantity was increased to 617,510 acres by a deed from the State, of date February 26, 1872; and on May 30, 1874, it received a further conveyance for more than 500,000 acres. Up to the end of the year 1869 the railroad company made numerous sales, on long time, and in small quantities for actual settlement.

Charles F. Latham died in October, 1870, seized and possessed, it is contended, of the equitable title to the undivided one thirty-seventh of the lands earned. He left nine heirs at law, among whom are the plaintiffs. The defendant, Ashbel H. Barney, acting for his associates, had a settlement with those heirs in reference to the sales of lands, and procured releases from them, which are averred to have been fraudulent and void as to the present plaintiffs. The facts averred in support of that charge need not be here detailed. They are fully set forth in the complaint.

The surviving associates of Charles F. Latham, together with N. C. Barney and Charles F. Barney, heirs at law of D. N. Barney, deceased, without the knowledge and consent of plaintiffs, incorporated themselves under the general laws of the State of Minnesota as the Winona and St. Peter Land Co., to which, by their direction, the railroad company conveyed, and by which were thereafter managed all the lands remaining unsold. The plaintiffs claimed that the individual defendants owed them, as heirs of Charles F. Latham, the further sum of \$3,500, on account of sales of land made both prior to his death and subsequently thereto, up to the time when the title to the lands was conveyed to the land company. The individual defendants repudiated the claim of plaintiffs to any further sum on that account, and the land company refused to recognize the claim of plaintiffs to an interest in the unsold lands.

The specific relief asked for is:

1st. That the individual defendants be required to account to plaintiffs for the amount of all moneys which came to their

hands from the sales of land prior to the death of Charles F. Latham, and pay over to plaintiffs the sum of \$8,500, or such other sum as shall be found, on an accounting, to be due them as their share thereof; also such amounts as might be due them out of the sums received by Ashbel H. Barney from purchasers subsequently to the death of Charles F. Latham.

2d. That the plaintiffs be adjudged to be the owners of two-ninths of one thirty-seventh part of all unpaid contracts and securities in the hands of the land commissioner of the company; that the land company be required to account with plaintiffs for all lands sold by it subsequently to the conveyance from the railroad company, and convey to them an undivided two-ninths of one thirty-seventh of all the unsold lands.

The individual defendants answered and put in issue all the material allegations of the complaint.

The land company in its answer admits the conveyance by the railroad company to have been without any consideration by it paid; that the stock therein is all held by its co-defendants and the heirs or personal representatives of D. N. Barney; and that if the relief prayed for against the other defendants be granted the company is liable to, and should account, to plaintiff as asked in their complaint. It consented that the matters and facts established and proven against its co-defendants may be considered as established and proven against it, and such judgment accordingly entered as might be equitable and proper.

Upon the petition, accompanied by a proper bond filed by the individual defendants, the State court entered an order that it would proceed no further in the suit. But upon motion of plaintiffs the circuit court remanded the suit to the State court upon the ground that it was not removable under the act of congress.

Is this suit removable upon the petition of the individual defendants, citizens of New York, Wisconsin and Massachusetts? Does the fact that the land company, one of the defendants, is a corporation of Minnesota, of which State one of the plaintiffs is a citizen, prevent a removal of the suit to the circuit court of the United States?

The answer to these questions depends upon the construction which may be given to the second clause of the second section of the act of March 8, 1875.

We will be aided in our construction of that act by recalling as well the language as the settled interpretation of previous enactments upon the subject of removal of causes from State courts.

The act of September 24, 1789, chapter 20, gives the right of removal to the defendant in any suit instituted by a citizen of the State in which the suit is brought against a citizen of another State. According to the uniform decisions of this court it applied only to cases in which all the plaintiffs were citizens of the State in which the suit was brought, and all the defendants citizens of other States. It made no distinction between a suit and the different controversies which might arise therein between the several parties; that is, Congress, when authorizing the removal of the suit, did not permit any controversy therein between particular parties to be carried into the Federal court, leaving the remaining controversies in the State court for its determination. If the whole suit could not be removed, no part of it could be taken from the State court.

Thus stood the law until the act of July 27, 1866, chapter 228, which provided (omitting such portions as have no bearing upon the present question) that "if any suit * * * in any State court, * * * by a citizen of the State in which the suit is brought against a citizen of another State, * * * a citizen of the State in which the suit is brought is, or shall be, a defendant, and if the suit, so far as relates * * * to the defendant who is a citizen of a State other than that in which the suit is brought, is, or has been, instituted or prosecuted for the purpose of restraining or enjoining him, or if the suit is one in which there can be a final determination of the controversy, so far as it concerns him, without the presence of the other defendants as parties in the cause, then, and in every such case, * * * the defendant who is a citizen of a State other than that in which the suit is brought, may, at any time before the trial or final hearing of the cause, file a petition for the removal of the cause as against him into the next

circuit court of the United States, to be held in the district where the suit is pending, and offer good and sufficient security for his entering in such court * * * copies of said process against him, and of all pleadings, depositions, testimony and other proceedings in said cause affecting or concerning him, and also for his there appearing; * * * and it shall be thereupon the duty of the State court to accept the surety and proceed no further in the cause as against the defendant so applying for its removal, * * * and the said copies being entered as aforesaid in such court of the United States, the cause shall there proceed in the same manner as if it had been brought there by original process against the defendant who shall have so filed a petition for its removal as above prescribed. * * * And such removal of the cause, as against the defendant petitioning therefor, into the United States Court shall not be deemed to prejudice or take away the right of the plaintiff to proceed at the same time with the suit in the State court, as against the other defendants, if he should desire to do so." (14 Statutes, 306.)

This provision is explicit, and leaves no room to doubt what congress intended to accomplish. It proceeds plainly, upon the ground, among others, that a suit may, under correct pleading, embrace several controversies, one of which may be between the plaintiff and that defendant who is a citizen of a State other than that in which the suit is brought; that to the final determination of such separate controversy the other defendants may not be indispensable parties; that in such a case, although a citizen of another State, under the particular mode of pleading adopted by the plaintiff, is made a co-defendant with one whose citizenship is the same as the plaintiff's, he should not, as to his separate controversy, be required to remain in the State court, and surrender his constitutional right to invoke the jurisdiction of the Federal court; but that, at his election, at any time before the trial or final hearing, the cause, so far as it concerns him, might be removed into the Federal court, leaving the plaintiff, if he so desires, to proceed in the State court against the other defendant or defendants. When there were several defendants to that separable controversy, all of whom are citizens of States other than that

in which the suit was brought, they could unite in claiming the removal of such controversy.

Next came the act of March 2, 1867, chapter 196, which allows the citizen of the State other than that in which the suit was brought, whether plaintiff or defendant, upon the proper affidavit of prejudice or local influence, filed before the final hearing or trial of the suit, to remove the suit into the Federal court. (14 Statutes, 558.)

It was construed in case of the Sewing Machine Companies, 18 Wall., 553, as allowing a removal, upon such an affidavit, only where there is a common citizenship upon each side of the controversy raised by the suit; that is, all on one side being citizens of the State in which the suit is brought, while all on the other side are citizens of other States. In that case the plaintiff and one of the defendants were citizens of the State where the suit was brought, while two of the defendants were citizens of other States. It was ruled that whatever was the purpose of the act of 1866 as to the particular cases therein provided for, congress did not intend by the act of 1867 to give to parties, who are citizens of States other than that in which the suit is brought, the right of removal, upon the ground of prejudice or local influence, when their co-defendants or co-plaintiffs, as the case might be, are citizens of the same State with some of the adverse parties. The court there evidently had in mind the case where the presence in the suit of all the parties on the side seeking removal was essential, that complete justice might be done, and not a suit in which there was a separable controversy, removable under the act of 1866.

We come now to the act of March 3, 1875, chapter 137, the second section of which is in these words: "That any suit of a civil nature at law or equity now pending, or hereafter brought, in any State court, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, * * in which there is a controversy between citizens of different States, * * * either party may remove said suit into the circuit court of the United States for the proper district; and when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can

be fully determined as between them, then either one or more of the plaintiffs or defendants, actually interested in such controversy, may remove said suit to the circuit court of the United States for the proper district." (18 Stat., pt. 8, 470.)

We had occasion to consider the meaning of the first clause of this section in Removal Cases, 100 U. S., 468. Disregarding as immaterial the mere form of the pleadings, and placing the parties on opposite sides of the real matter in dispute, according to the facts, we found that the only controversy there was between citizens of Ohio and Pennsylvania on one side, and certain corporations created under the laws of Iowa on the other. And we held that if, in arraigning the parties upon the respective sides of the real matter in dispute, all those on one side are citizens of different States from those on the other, the suit is removable under the first clause of the second section of the act of 1875—those upon the side seeking a removal uniting in the petition therefor. Whether that suit was not also removable under the second clause of that section we reserved for consideration until it became necessary to construe that part of the statute. The present case imposes that duty upon us.

We may remark that with the policy of the act of 1875 we have nothing to do. Our duty is to give effect to the will of the law making power when expressed within the limits of the Constitution.

We are of opinion that the intention of congress, by the clause under consideration, was not only to preserve some of the substantial features or principles of the act of 1866, but to make radical changes in the law regulating the removal of causes from State courts. One difference between that act and the second clause of the second section of the act of 1875 is that, whereas the former accorded the right of removal to the defendants who were citizens of a State other than that one in which the suit was brought—if between them and the plaintiff or plaintiffs there was in the suit a controversy finally determinable as between them, without the presence of their co-defendants, or any of them, citizens of the same State with plaintiffs—the latter gave such right to any one or more of the plaintiffs or the defendants actually interested in such

separate controversy. Both acts alike recognized the fact that a suit might, consistently with the rules of pleading, embrace several distinct controversies. But while the act of 1866 in express terms authorized the removal only of the separable controversy between the plaintiff and the defendant or defendants seeking such removal—leaving the remainder of the suit, at the election of the plaintiff, in the State court—the act of 1875 provided, in that class of cases, for the removal of the entire suit.

That such was the intention of congress is a proposition which seems too obvious to require enforcement by argument. While the act of 1866 expressly confines the removal to that part of the suit which specially relates to or concerns the defendant seeking the removal, there is nothing whatever in the act of 1875 justifying the conclusion that congress intended to leave any part of a suit in the State court where the right of removal was given to, and was exercised by, any of the parties to a separable controversy therein. Much confusion and embarrassment, as well as increase in the cost of litigation, had been found to result from the provision in the former act permitting the separation of controversies arising in a suit, removing some to the Federal court, and leaving others in the State court for determination. It was often convenient to embrace in one suit all the controversies which were so far connected by their circumstances as to make all who sue, or are sued, proper, though not indispensable, parties. Rather than split up such a suit between courts of different jurisdictions congress determined that the removal of the separable controversy to which the judicial power of the United States was by the Constitution expressly extended, should operate to transfer the whole suit to the Federal court.

If the clause of the act of 1875 under consideration is not to be thus construed, it is difficult to perceive what purpose there was in dropping those portions of the act of 1866 which, *ex industria*, limited the removal, in the class of cases therein provided for, to that controversy in the suit which is distinctly between citizens of different States, and of which there could be a final determination without the presence of the other defendants as parties in the cause.

It remains only to enquire how far this construction of the act of 1875 controls the decision of the case now before us.

The complaint, beyond question, discloses more than one controversy in the suit. There is a controversy between the plaintiffs and the Winona and St. Peter Land Co., to the full determination of which the other defendants are not, in any legal sense, indispensable parties, although, as stockholders in the company, they may have an interest in its ultimate disposition. Against the latter, as a corporation, a decree is asked requiring it to convey to the plaintiffs an undivided two-ninths of one thirty-seventh of certain lands, and to account for the proceeds of the lands by it sold subsequently to the conveyance from the railroad company.

But the suit as distinctly presents another and entirely separate controversy, as to the right of the plaintiffs to a decree against the individual defendants for such sum as shall be found upon an accounting to be due from them upon sales prior to the conveyance from the railroad company. With that controversy the land company, as a corporation, has no necessary connection. It can be fully determined as between the parties actually interested in it without the presence of that company as a party in the cause. Had the present suit sought no other relief than such a decree it could not be pretended that the corporation would have been a necessary or indispensable party to that issue. Such a controversy does not cease to be one wholly between the plaintiffs and those defendants because the former, for their own convenience, choose to embody in their complaint a distinct controversy between themselves and the land company. When the petition for removal was presented there was in the suit, as framed by plaintiffs a controversy wholly between citizens of different States, that is, between the plaintiffs, citizens respectively of Minnesota and Indiana, and the individual defendants, citizens of New York, Wisconsin and Massachusetts. And since the presence of the land company is not essential to its full determination, the defendants, citizens of New York, Wisconsin and Massachusetts, were entitled, by the express words of the statute, to have the suit removed to the Federal court.

It may be suggested that if the complaint has united causes of action which, under the settled rules of pleading, need not, or should not, have been united in one suit, the removal ought not to carry into the Federal court any controversy except that which is wholly between citizens of different States, leaving for the determination of the State court the controversy between the plaintiffs and the land company. We have endeavored to show that the land company was not an indispensable party to the controversy between the plaintiffs and the defendants, citizens of New York, Wisconsin and Massachusetts. Whether those defendants and the land company were not proper parties to the suit we do not now decide. We are not advised that any such question was passed upon in the court below. It was not discussed here, and we are not disposed to conclude its determination by the court of original jurisdiction, when it is therein presented in proper form.

A defendant may be a proper, but not an indispensable, party to the relief asked. In a variety of cases it is in the discretion of the plaintiff as to whom he will join as defendants. Consistently with established rules of pleading he may be governed often by considerations of mere convenience; and it may be that there was, or is, such a connection between the various transactions set out in the complaint as to make all the defendants proper parties to the suit, and to every controversy embraced by it—at least in such a sense as to protect the complaint against a demurrer upon the ground of multifariousness or misjoinder.

In *Oliver v. Pratt*, 3 How., 411, we said: "It was well observed by Lord Cottenham, in *Campbell v. Mackay*, 1 Mylne & Craig, 603, and the same doctrine was affirmed in this court in *Gaines, &c. v. Relf*, 2 How., 619, that it is impracticable to lay down any rule as to what constitutes multifariousness as an abstract proposition; that each case must depend upon its own circumstances; and must necessarily be left, where the authorities leave it, to the sound discretion of the court." We further said that the objection of multifariousness can not, "as a matter of right, be taken by the parties except by demurrer, or plea, or answer, and if not so taken it is deemed to

be waived;" that although the court may take the objection, it will not do so unless it deem such a course necessary or proper to assist in the due administration of justice. (Story's Eq. Pl., sections 580 to 540; *Shields v. Thomas*, 18 How., 259; *Fitch v. Creighton*, 24 How., 168.)

No objection was taken by the defendants in the court below to the complaint upon the ground of multifariousness or misjoinder, and the plaintiffs should not be heard to make it for the purpose, or with the effect, of defeating the right of removal. They are not in any position to say that that right does not exist, because they have made those defendants who were not proper parties to the entire relief asked. The fault, if any, in pleading was theirs. Under their mode of pleading, whether adopted with or without a purpose to affect the right of removal accorded by the statute, the suit presents two separate controversies, one of which is wholly between individual citizens of different States and can be fully determined without the presence of the other party defendant. The right of removal, if claimed, in the mode prescribed by the statute depends upon the case disclosed by the pleadings as they stand when the petition for removal is filed. The State court ought not to disregard the petition upon the ground that, in its opinion, the plaintiffs, against whom a removal is sought, had united causes of action which should, or might, have been asserted in separate suits. Those are matters more properly for the determination of the trial court, that is, the Federal court, after the cause is there docketed.

If that court should be of opinion that the suit is obnoxious to the objection of multifariousness or misjoinder, and for that reason should require the pleadings to be reformed both as to the subject-matter and parties, according to the rules and practice which obtain in the courts of the United States, and if, when that is done, the cause does not really and substantially involve a dispute or controversy within the jurisdiction of that court, it can, under the fifth section of the act of 1875, dismiss the suit or remand it to the State court, as justice requires.

We are of opinion that, upon the filing of the petition and bond by the individual defendants in the separable contro-

versy between them and the plaintiffs, the entire suit, although all the defendants may have been proper parties thereto, was removed to the circuit court of the United States, and that the order remanding it to the State court was erroneous.

The judgment is reversed, with directions to the court below to overrule the motion to remand, to reinstate the cause upon its docket, and proceed therein in conformity with the principles of this opinion.

Mr. Justice Swayne, while on the bench, participated in the decision of this case in conference, and concurs in this opinion. The judgment now ordered is directed to be entered as of 10th of January, 1881, when the cause was submitted in this court.

Mr. Justice Miller:

I dissent from the judgment and opinion of the court in this case, and am requested to say that the Chief Justice and Mr. Justice Field also dissent.

KENTUCKY COURT OF APPEALS.

RENNICK v. CURRY.

(Filed November 15, 1877—Not to be reported.)

1. The duty of supervisors of tax books to examine the same and correct errors of the assessor is ministerial and not judicial.

2. It is their duty to keep a record of their proceedings and correct the tax books thereby, and to return the same, together with the tax books, to the clerk of the county court for safe keeping.

A substantial compliance with the provisions of the statute is sufficient.

3. After returning the tax books with their corrections the supervisors had no authority in this case to amend or correct their certificate.

4. Persons aggrieved by the action of the supervisors may have relief upon application to the county court.

5. But a court of equity will not enjoin the collection of a tax upon the mere ground of irregularity in the assessment.

Appeal from Clark Common Pleas Court.

Opinion of the court by Chief Justice Lindsay.

By section 5, article 6, chapter 92, General Statutes, it is made the duty of the supervisors of the tax book to examine the same with care and to correct any errors of the assessor; and in cases where they shall be of opinion that any property has not been correctly valued to fix a proper value on the

same. This is a ministerial and not a judicial duty, and if any citizen is aggrieved by the action of this ministerial or revisory board he may have relief upon application to the county court under the provisions of section 2, article 7 of said chapter.

It is the duty of the board to keep a record of their proceedings, and correct the tax book thereby. (Section 7, article 6, ib.) The statute does not prescribe specifically how these corrections are to be made. In this case they were made, so far as real estate was concerned, by changing on the face of the book the valuations reported by the assessor, and also by a regular report duly signed by each and all of the supervisors. The corrections made in the valuations of short horn cattle are evidenced alone by the report of the majority of the supervisors, but this was a substantial and sufficient compliance with the provisions of the statute, said report having been returned with the tax book to the clerk of the county court for safe keeping.

The original certificate of the supervisors did not show that they had corrected the tax book, but merely that they had examined and approved it. But their report showed that their approval was based on the corrections mentioned therein, and the county court clerk had the right, in certifying their approval to the county court, and in making out the copy for the sheriff, to treat said report as part and parcel of the tax book. The subsequent attempt of the supervisors to correct their certificate was without authority, but as there had theretofore been a substantial compliance with the law the technical defect in failing to make the original certificate as full as it should have been could not operate to render their action void. That it was irregular may be admitted, but equity will not enjoin the collection of a tax upon the mere ground of irregularity in the assessment.

If substantial wrong was done the appellant by the increase of the valuation of his cattle his remedy was by application to the county court, where the matter might have been judicially inquired into.

The judgment dissolving the injunction is affirmed.

L. B. Grigsby, W. M. Beckner and B. J. Peters for appellant.

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Sam M. Boone, T. M. Eginton and French & Tucker for appellee.

In the absence of current opinions during the recess of the Court of Appeals we have selected the foregoing opinion because it settles several important disputed questions as to duty of supervisors of tax books, and more especially because it settles the question that a court of equity will not enjoin the collection of a tax upon the mere ground of irregularity in the assessment.

HAMILTON v. FUGETT, &c.

(Filed March 8, 1881.)

1. Void patents for vacant lands—A patent for 74,866 acres, excluding 60,518 acres prior grants, in which the prior grants for 60,518 acres are not identified, is void.

2. None but vacant lands can be appropriated—The survey is for the purpose of identifying them. Every entry, survey or patent embracing previously entered, surveyed or patented lands is absolutely void to the extent of such lands. (Section 3, chapter 109, General Statutes.)

Appeal from Morgan Circuit Court.

Opinion of the court by Judge Hargis.

The evidence does not establish with certainty the length of time the appellee, Williams, occupied the land in controversy before the action was instituted, and it is not necessary, in view of a more important and controlling question, to analyze the evidence on the plea of limitation in order to its settlement.

The patent relied on by appellant was issued May 15, 1849, to M. J. Amyx for 74,966 acres, excluding 60,518 acres prior grants.

There is no description of the excluded 60,518 acres. No lines, corners, courses, distances or bounds whatever are given. The dividing lines of counties with such courses and distances are called for with reference to the 74,866 acres as indicate an effort to appropriate whatever vacant lands that might be embraced by them without regard to identification or the rights of the numerous citizens who reside within the sweeping lines thrown around them by the survey upon which the patent issued.

The patent is so uncertain as to enable the patentee, or those claiming under him, whenever a controversy arises as to any portion of the 74,866 acres, to claim the location of the excluded 60,518 acres in any part of the patent boundary. So that a controversy with an occupant claimant or patentee on the eastern side may find its location on the western borders, and vice versa.

To sustain this patent would violate the whole purpose and spirit of the statutes regulating the entry and grant of vacant lands.

None but vacant lands can be appropriated, and the survey is for the purpose of identifying them. And every entry, survey or patent embracing previously entered, surveyed, or patented lands is absolutely void to the extent of such lands. (Section 3, chapter 109, General Statutes.)

Here the patent leaves everything in doubt and uncertainty as to the location of either the vacant or the excluded lands. Neither can be found or ascertained by the patent, and, therefore, it is void.

The judgment below having been based upon the fact that the patent is void because of its uncertainty, is, therefore, affirmed.

Hazelrigg & Henry for appellant.

J. R. Botts for appellees.

HOME INS. CO. OF N. Y. v. GADDIS.

SAME v. BOWEN.

(Filed September 12, 1878—Not to be reported.)

1. Waiver by refusal to perform contract—The insurance company having, in this case, by its cross petition given notice that it would not pay in any event, violated its contract, and the assured had a right to sue without furnishing the preliminary proofs required by the policy, and without showing that its production had been otherwise waived.

2. Alteration of written contracts by parol agreement—Although parties may agree that a contract which they have reduced to writing shall not be altered unless the agreement for such alteration be evidenced by writing, yet a subsequent parol agreement to alter will be as valid as if no such stipulation had been in the original written contract.

3. A cross appeal will not lie against a co-appellee, but can only be prosecuted by appellees against appellants.

4. A contract of insurance against fire is a contract for indemnity only, and if a proper defense is made the assured can never recover more than the value of the thing insured, but in this case, although the value of the property was not equal to the aggregate amount of the incumbrances and the policies, that issue not having been made by the pleadings, the court could not decide the case upon issues which the evidence shows could have been successfully made, but which the parties omitted to make.

Appeal from Campbell Chancery Court.

Opinion of the court by Judge Cofer.

Each of the appellants made its answer in the consolidated actions of Gaddis & Co. v. Mary A. Bowen and Mary J. Hickman a cross petition against Mrs. Hickman, and called upon her to set up any claim she had under the policies on the Cold Spring property, and asked that said policies be adjudged void and be cancelled.

In these cross petitions, which were filed in May, 1875, it was alleged that the property covered by the policies was destroyed by fire December 1, 1874, and that the assured had failed to give immediate notice of the loss, and to make out and furnish to the companies preliminary proofs of the loss as required by the policies, and that on account of such failure the policies had become void.

It was also alleged that the property insured did not belong to Mrs. Hickman, but was held by her in trust for her mother, Mrs. Bowen, and that Mrs. Hickman had concealed from the insurers divers encumbrances on the property which were unknown to them, and that the policies were on that account void.

They each made its answer a cross petition against Mrs. Hickman, and called upon her to set up her claim, and then prayed that the policies might be cancelled.

In a separate answer to each of these cross petitions Mrs. Hickman alleged that she did give notice to each of the companies immediately after the loss; and she also alleged facts intended to show that the furnishing of preliminary proofs required by the policies had been waived; she denied all allegations of fraud and the alleged concealment of encumbrances on the property, and alleged that she disclosed fully and in good faith all existing liens. She made her answers counter-

claims against the companies, and prayed for judgment against each for the amount of its policy.

To these answers replies were filed, a trial was had, and judgments rendered in her favor as prayed for, and from these judgments these appeals are prosecuted.

We need not enter into the question whether there was a waiver of the preliminary proofs by anything occurring prior to the filing of the cross petitions by the appellants.

In their cross petitions the companies assumed that it was then too late to make the preliminary proofs, and that as such proofs had not been made they were discharged from liability, and for this, among other reasons, sought to cancel the policies. The facts disclosed certainly excused an earlier presentation of the proofs, if they did not show a waiver of the right to insist upon such proofs being made at all, and having called upon the assured to assert her claim, and, at the same time, asked to have the policies cancelled as no longer obligatory on them, they clearly can not now be heard to say that the suits were premature, or to have them dismissed because the proofs were not made, and especially so, when they distinctly refused to pay upon other grounds, and, relying on these grounds, have themselves come into court to have the policies cancelled.

By the terms of the policies the assured could not maintain actions thereon without making the required preliminary proofs, but when the companies denied their liability, and refused to pay upon other grounds which would not have been removed by such proofs, then the proofs would have been vain and futile, and, therefore, need not be made.

It is a well-settled principle of the law of contracts, as applicable to contracts of insurance as to any other class of contracts, that if one party to a contract gives notice that he will not perform his part, such refusal is of itself a breach of the contract, and the other party, in suing on it, need not allege performance or readiness to perform conditions which he would have been otherwise required to perform, or offer to perform, before commencing suit. (Bishop on Contracts, section 692.)

The companies having, by their cross petition, given notice that they would not pay in any event, violated their contract,

and the assured had a right to sue without furnishing the requisite preliminary proofs or showing that its production had been otherwise waived.

Upon the question whether the state of the title and the encumbrances on the property were truly stated to the agents of the companies the evidence is conflicting. Mrs. Bowen, Mrs. Crews and Mrs. Hickman all swear that it was. The agent for the Home and the Franklin does not distinctly deny in his testimony that the encumbrances were made known to him. He admits that at least one was disclosed, and it is quite natural to infer that, as the subject of encumbrances was discussed and one was disclosed, all were disclosed.

The agent of the Aetna says no encumbrances were disclosed to him, but the court below found the fact against him, and this court can not, on the evidence before it, reverse that finding.

The allegation that the conveyance to Mrs. Hickman was in fraudulent trust for Mrs. Bowen is not sustained, and the judgments in favor of Mrs. Hickman must be affirmed.

The only defense relied upon to the policy insuring the personal property of Mrs. Bowen is that the policy was assigned to Mrs. Hickman before the loss without the knowledge or consent of the company.

The policy contains a provision that "if this policy shall be assigned before a loss without the consent of the company endorsed hereon" the policy shall be void.

It is not claimed that the written consent of the company to the assignment was ever obtained, but there is evidence conducing to prove that the agent who issued the policy had knowledge of, and assented to, the assignment.

Two or three witnesses swore that such consent was given, and the agent swore it was not given. The court below found that he did consent, and that finding will not be disturbed.

The validity of contracts must be determined by law and not by stipulation between the parties, and although parties may agree that a contract which they have voluntarily reduced to writing shall not be altered or modified unless the agreement for such alteration or modification be evidenced by writing,

yet a subsequent agreement by parol to alter or modify will be as valid as if no such stipulation had been in the written memorial of the original contract, and it follows that, having consented by parol to the transfer, the company is as much bound as if its consent was in writing. It results, therefore, the judgment in favor of Gaddis & Co. must be affirmed so far as the appellants are concerned.

Counsel for Mrs. Hickman claims that the court erred in adjudging the proceeds of the policy to Mrs. Bowen to her creditors, and insists that such proceeds should have been adjudged to Mrs. Hickman.

But no such question is, or can be, presented on this appeal. No cross appeal by her against her co-appellees, Gaddis & Co., will lie. Such appeals can only be prosecuted by appellees against appellants.

The judgments must be affirmed on both the original appeals.

Judge Cofer delivered the following response to the petition of counsel for appellants for a rehearing:

Counsel have made a mistake in quoting from the opinion on page 7 of their petition or the clerk has made a mistake in copying the opinion.

The sentence commencing with the words "the agent for," etc., is not in the opinion as delivered by the court.

As printed in the petition it is without meaning, or else is ridiculously absurd. What we wrote is as follows: "The agent for the Home and the Franklin does not distinctly deny in his testimony that the encumbrances were made known to him. He admits that at least one was disclosed, and it is quite natural to infer that, as the subject of incumbrances was discussed and one was disclosed, all were disclosed."

If the opinion as written be considered, then the absurdity of holding that the disclosure of one encumbrance would prevent the concealment of others from operating to vitiate the policy is not found.

Whether the blunder which attributes this absurdity to the court was made by counsel or by the copyist we do not know.

As to the value of Mrs. Hickman's insurable interest in the property, or the value of the house that was destroyed, or of the house and land together, there is not a word in the pleadings of the appellants.

The evidence certainly shows that the value of the property was not near equal to the aggregate amount of the encumbrances and the policies, and it is certainly a clear legal rule that a contract of insurance against fire is a contract for indemnity only, and that if proper defense is made the assured can never recover more than the value of the interest he had in the thing insured; but counsel must be aware that the court must decide causes on the issues made by the pleadings, and not upon issues which the evidence shows could have been successfully made, but which the parties omitted to make.

It is alleged that the conveyance to Mrs. Hickman was for the recited consideration of \$4,850, and she admits she bought the property at that sum subject to the encumbrances. But it does not necessarily follow that the property was worth no more than the encumbrances and the amount paid to Mrs. Bowen. Mrs. Hickman may have bought it at less, or she may have paid more, than its value, and of course what she paid is no certain criterion upon which to decide how much the property was worth. If, as the evidence strongly tends to prove, the property was not worth more than \$8,000 or \$10,000, and the encumbrances amounted to \$7,000, then Mrs. Hickman only lost from \$1,000 to \$3,000, and if these facts had been pleaded the recovery would either have been limited to the excess of the value of the property over the encumbrances or altogether defeated. But as they were not pleaded we can not inquire into that question.

The only issues made were:

1st. That Mrs. Hickman was not the owner of the property, but held it in fraudulent trust for Mrs. Bowen and her creditors.

2d. That there were encumbrances on the property which she failed to disclose; and,

3d. That the stipulated preliminary proofs had not been made.

The first and second of these defenses were not sustained by the evidence, and the third was waived by making the answers cross petitions and seeking to have the policies canceled.

Petition overruled.

R. D. Smalley and A. Duvall for appellants.

E. W. Hawkins for appellees, Gaddis, &c.

F. M. Webster for appellees, Bowen, &c.

COMMONWEALTH v. STEVENS, &c.

(Filed March 15, 1881—Not to be reported.)

1. Petition against the State must show a right and cause of action in the plaintiff against the State.

By conferring authority upon Stevens, &c., to sue the State legislature did not thereby admit that they had a cause of action or were entitled to a recovery against the State.

2. The petition of Stevens, &c., against the State was insufficient because it did not state facts sufficient to show a right to recover, or cause of action in the plaintiffs against the State.

In an action against the State the plaintiff must conform to the requirements of the act authorizing the action to be brought.

3. The act incorporating "the Green and Barren River Navigation Co.," approved March 9, 1868, by which "the Green and Barren river line of navigation and their tributaries," together with the grounds, etc., were "loaned and conveyed" to that corporation for thirty years, was not an election by the State to purchase or appropriate the improvements on Rough creek, a tributary of Green river, under the right reserved in the act incorporating the Rough Creek Navigation Co. Nor did the State thereby become liable, as purchaser or otherwise, for the "original cost of the same." or for damages for the loss of the value thereof.

4. The doctrine of Charles River Bridge v. Warren Bridge, &c., 11 Peters, 420, is approved.

In this case the Hon. Alvin Duvall and the Hon. Wm. Lindsay were appointed special judges by the governor in place of Judges Cofer and Hines.

Judge Pryor and special Judges Duvall and Lindsay constituted the court in the consideration and decision of this case. Judge Hargis not sitting.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Duvall.

By an act of the legislature, approved 8th March, 1856, a company was incorporated to build such locks and dams on Rough creek as might be deemed necessary for its navigation. Any one or more individuals who should enter into a prescribed bond "shall be deemed the company, and entitled to all the rights and privileges hereof."

The company was to have power to condemn lands; to be responsible for all damages resulting from the erection of said dams; all the property belonging to the company to be liable for its debts or the damages caused by its works; it was authorized to receive such tolls as it might demand, "not exceeding those upon Green River, and at all times subject to the revision of the board of internal improvement."

The business of the company was declared to be the improvement of the navigation of Rough creek, and the erection and carrying on of such machinery and manufacturing as they might build.

The right was reserved to the State to buy the company's interest in the locks and dams by paying the original costs of the same, with interest. (Acts, 1865-6, page 124.)

Under this charter a company was organized, who went on to construct a lock and dam and perhaps other improvements.

In February, 1866, James Ford sued the company to recover an alleged balance of about \$3,600 for work done by him in constructing the lock and dam, and to enforce a lien therefor upon the property. Other creditors came in and set up their claims and liens. A receiver was appointed to collect the tolls at the lock, and, in certain contingencies, to lease it out to the highest bidder. It was accordingly leased at a rental of \$30 for the first six months, and \$220 for the next six months, and on the 1st of October, 1867, the court rendered a judgment reciting and adjudging "that the R. C. N. & Man. Co. have not the means to discharge its obligations, and that the rents of its property will be insufficient ever to pay the same, it is, therefore, ordered that lock and dam No. 1, on Rough creek, together with all its fixtures and property, and all the corporate rights of said company under the charter, so far as the same can be sold by law, and the real estate incident or belonging to said lock and dam or said company, except the water power, be sold for the purpose of paying off the debts of the company," etc.

On the 6th of July, 1868, a sale of the property was made under this judgment, Wm. Brown becoming the purchaser, at the price of \$3,200, who gave bond therefor with Wm. Duke,

Sr., J. B. Stevens, Titus Bennett and Joe B. Bennett, his sureties. The sale was confirmed on the 7th of October following.

On the 9th of March, 1868, the legislature incorporated the Green and Barren River Navigation Co., by which the "Green and Barren River line of navigation, and their tributaries," together with the grounds, houses, franchises, etc., were "loaned and conveyed to the corporation for the term of thirty years from and after the time they get possession thereof."

The 6th section of the act provides that all tolls shall inure to the company; establishes the rate of tolls on certain classes of boats passing each designated lock on the two rivers; and authorizing the company to establish tolls on other boats, passengers, etc., from time to time, not exceeding the present rates established by the Board of Internal Improvement, "as applicable to the Kentucky, Green and Barren river lines of navigation at this time."

The company immediately took possession of the property and franchises so "loaned and conveyed."

Afterwards the plaintiff, John B. Stevens, and others, claiming to be the "present owners" of the improvements on Rough creek, claiming that the act incorporating the Green and Barren River Navigation Co. gave that company such franchises as were the cause of effectually destroying the value of their improvements on Rough creek and making it worthless to them; and claiming finally that they were entitled to damages from the State for the loss of their property on account of the legislation referred to, obtained the passage of the act approved March 11, 1876, which, after reciting the foregoing claims, authorized the plaintiffs to file their petition, setting forth their demand for damages, the allegations to be treated as controverted, and to be established by proof; and if on the hearing it should be found "that the plaintiffs are the owners of the improvements on Rough Creek, * * * and that they are entitled, under the law and facts of the case, to damages against the State for the loss of the value of their improvements, as recited in the preamble of this act," judgment therefor should be rendered against the Commonwealth.

In April following the plaintiffs filed this petition. The court below overruled the demurrers, general and special, filed by the defendant, and on the evidence rendered judgment in favor of the plaintiffs for \$4,928, with interest from 12th of July, 1877, to reverse which the Commonwealth has appealed.

By the terms of the enabling act the appellees were required to establish, by appropriate allegation and proof, these propositions:

1st. That they were, at the time of the passage of the act, the owners of the improvements on Rough Creek: and,

2nd. That they were "entitled, under the law and facts of the case, to damages against the State for the loss of the value of their improvements as recited in the preamble of this act.

1st. In their petition the appellees allege merely "that they are the owners, and personal representatives of the owners in part, of said property, as stated herein, and successors to said company." When, or how, they became either owners of the property, or successors to the company, is not shown. It appears, as already stated, that at the decretal sale reported by the commissioner in the case of Ford against the company Wm. Brown became the purchaser of the property, and that Duke, Stevens and the two Bennetts were his sureties in the bond for the price. It is not pretended that the appellees acquired the title or ownership of the property otherwise than under this purchase: and there is a total failure of proof to show that Duke, Stevens or the Bennetts acquired any title whatever, either by purchase from Brown or otherwise. It would seem to result that, having failed to establish their ownership of the property, they at least were not entitled to relief.

2d. But waiving this point, and conceding that Brown and his sureties became joint purchasers and owners under the decretal sale, the remaining inquiry is, did they thereby become "entitled, under the law and facts of the case, to damages against the State for the loss of the value of their improvements?"

For the appellees it is insisted that the second section of the act incorporating the Green and Barren River Navigation Co., by which "the Green and Barren river line of navigation and their tributaries," together with the grounds, etc., were

"loaned and conveyed" to that corporation for thirty years, was an election by the State to buy the improvements on Rough creek, under the right reserved in the act incorporating the Rough Creek Navigation Co.; that it was an absolute purchase and appropriation by the State of those improvements, the title of which vested at once, and that immediately upon the passage of the act authorizing the loan and conveyance the State became liable, as a purchaser, for the "original costs of the same with interest" from the date of the completion of the work.

If this proposition were conceded it is not easy to see how it would help the claim of the appellees. If the State purchased this property on the 9th of March, 1868, and thereby acquired the title, and became at once liable for the cost of it with interest, what possible title or right could the appellees have acquired by the purchase at the decretal sale of the same property made on the 6th of July, 1868? What was there for the commissioner to sell or the purchaser to buy?

But there was no such purchase. The State, in loaning to the Green and Barren River Navigation Co. for thirty years the Green and Barren river line of navigation and their tributaries, did not include, and could not have intended to include, the improvements on Rough creek. It included such tributaries of the two rivers as were within the control of the State—such as it had a right to lease or loan, and none other. Neither the State nor the Green and Barren River Navigation Co. ever construed the lease as embracing the lock and dam on Rough creek; no possession of them was ever claimed or taken; nor is it pretended that they were of any use or value whatever to that corporation.

Besides, the appellees asserted no claim founded on the supposed purchase by the State, either in their application to the legislature for authority to sue or in their petition. Their claim, as recited in the preamble of the enabling act, was that the act incorporating the Green and Barren River Navigation Co. conferred on that company such franchises as caused the destruction of the value of their improvements on Rough

creek, "making it worthless to them, and an obstruction to the natural navigation of said stream."

And the fourth section of the act provides that if on the hearing it shall be found that the plaintiffs are the owners of the improvements, and are entitled to damages "for the loss of the value of their improvements, as recited in the preamble of this act," the court or jury "shall fix the amount of such damage," and render judgment. The authority of the appellees to sue is thus restricted by the act to a single well-defined cause of action, depending purely on damages, and necessarily excludes any cause of action arising upon contract.

If it were conceded that the State was liable for the damages resulting from the supposed loss of the value of the Rough creek improvements, as recited in the enabling act, we are of opinion that the Rough creek Navigation and Manufacturing Co., and not the appellees, would be entitled to such damages.

The alleged wrongful act of the State—the passage of the charter of the Green and Barren River Navigation Co.—was done on the 9th of March, 1868. The corporation which made the improvements on Rough creek was undoubtedly the owner of them at that time. True there was then a judgment against the corporation for the sale of its property, but that judgment in no way divested or impaired its title. The judgment was executed by the sale made on the 6th of July, 1868.

What passed by that sale? Certainly not the right of action which had accrued four months previously to the corporation. Where real property, valuable chiefly for its improvements, is adjudged to be sold, and before the sale a wrong-doer wantonly destroys the improvements, would it be seriously contended that the subsequent purchaser would be entitled to the damages resulting from the injury, either upon the ground—as argued here—that the sale related back to the judgment, or that the purchaser was the successor of the original owner?

But we are of opinion that, under no possible view of the "law and facts of the case," can the State be held liable, either

to the corporation or to the appellees, for the damages resulting from the supposed injury.

It is alleged in the petition that at the time the charter of 1856 was passed the State had control of the works on Green and Barren rivers, on which it had established certain rates of toll; that in view of these privileges belonging to, and used by, the State, the investments on Rough creek were made, "and these were the inducements moving thereto, and these were the pledges made to said company and successors by the defendant at the time of said investments;" that in March, 1868, the State, in violation of said contract, leased to a company, then incorporated, the Green and Barren river line of navigation, with authority to charge higher rates of toll, which company, under the authority thus conferred, did lawfully charge boats running on Green river such rates of toll as to drive them from the trade on Rough creek, thereby destroying the value of the lock and dam on that stream.

The idea of a contract or pledge arising, by way of implication, out of a grant like this was effectually set at rest by the celebrated case of *Charles River Bridge v. Warren Bridge, &c.*, 11 Peters, 420, in which the legislature of Massachusetts incorporated a company in 1785 to build a bridge over Charles river, granting them tolls. The bridge was built under this charter, and the corporation received the tolls allowed by the law. In 1828 another company was incorporated to build the Warren bridge, near the former, over the same river. This bridge was allowed to, and did, become free after a few years. The result was that the value of the franchise granted by the act of 1785 was entirely destroyed. In the suit brought by the Charles River Bridge Co. the principal ground of relief relied on was that the charter granted the Warren Bridge Co. was a violation of the contract implied by the grant to the former. "Its income," says the Supreme Court, "is destroyed by the Warren bridge, which, being free, draws off the passengers and property which would have gone over it, and renders their franchise of no value. This is the gist of the complaint. In order then to entitle themselves to relief it is necessary to show that the legislature contracted not to do the act of

which they complain." But it was held that the charter contained no such contract on the part of the State; it contains no words that even relate to another bridge, or to the diminution of their tolls, or to the line of travel, and that such an agreement can not be implied.

This court has distinctly and repeatedly approved this doctrine. In the case of the Richmond and Lexington Turnpike Road Co. v. Rogers, 1 Duvall. 135, it was held that in granting a ferry or other similar franchise the State does not deprive itself of the power to construct other facilities of trade and travel, although the exercise of the power may, and generally does, result in individual loss and injury for which no legal means of redress are provided.

It follows that in the grant made to the Rough Creek Co. the State entered into no agreement, express or implied, that there should be no impairment of the profits of the franchise by any change which the State might choose to make in the rates of toll on either of the rivers. On the contrary, those rates on both rivers were expressly placed within the uncontrolled discretion of the legislature. The Rough Creek Co. was given power to demand tolls "not exceeding those upon Green river, and at all times subject to the revision of the Board of Internal Improvement." The tolls upon Green river were at the time under the control of the same board, which was a mere agency of the State.

The wisdom of the law under which the tolls on Green river were increased may be questionable, but the power of the legislature to pass it seems undoubted.

The judgment is reversed on the original appeal and affirmed on the cross appeal and the cause remanded, with directions to sustain the general demurrer to the petition and to dismiss the action.

P. W. Hardin, Attorney-General, for appellant.

W. N. Sweeney & Son and E. D. Walker for appellees.

HENDERSON NATIONAL BANK v. LAGOW.

(Filed October 31, 1878—Not to be reported.)

1. A desire to further secure a pre-existing debt was a sufficient consideration in this case to uphold the executed contract of assignment of notes as an additional security therefor, and to vest the title to, and beneficial interest in, the notes in the assignee.

2. The statute has not made inadequacy of consideration, or even the absence of any consideration at all, for an assignment a valid defense to an action by the assignee.

3. The criterion by which to test a legal defense against an assignee is to suppose the note due and an action brought by the assignor, at the time the maker received notice of the assignment, and then to inquire whether the matter relied on existed and could have been pleaded to that action. If it could not, then it constitutes a valid, legal defense or set-off against the assignee.

4. A defense or a set-off to be available against an assignee, under the statute, must have existed before notice of the assignment; but such defenses and set offs may sometimes be allowed upon equitable grounds independent of the statute.

But a party seeking to make a defense or setoff in equity, beyond that given by the statute must show affirmatively the existence of the facts necessary to raise the equity.

(See opinion as to the difference between this case and *Lee v. Smead, &c.*, 1 Met., 623, and *Bay v. Coddington*, 5 Johnson's Chy., 56.)

5. One person can not cast upon another the loss resulting from his own laches.

Appeal from Henderson Court of Common Pleas.

Opinion of the court by Judge Cofer.

Although the bank gave no new consideration for the assignment of the notes, Stapp had a right to give, and the bank to accept, additional security for the pre-existing debt for which Stapp was bound, and Stapp's desire to further secure the debt was a sufficient consideration to uphold the executed contract of assignment, and to vest the title to, and beneficial interest in, the notes in the bank. Being thus vested with the title to the notes, the bank might maintain an action on them against the maker, and, so far as mere legal defenses are concerned, its right to recover can not be in anywise affected by the consideration on which the assignments to it were based.

The criterion by which to test a legal defense against an assignee is to suppose the note due and an action brought by the assignor at the time the maker received notice of the assign-

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ment, and then to inquire whether the matter relied on existed and could have been pleaded to that action. If it could not, then it constitutes no valid legal defense or set-off against the assignee, and the right to make it is not reserved to the maker by the statute which only provides for such as existed, and could have been used against the assignor before notice of the assignment. (Walker v. McKay, 2 Met., 294.)

Applying this test to the defense pleaded in this case, it must be held not to be valid as a legal defense. It does not come within the statutory reservation. It did not exist, and could not have been used against the assignor before notice of the assignment, for the debt to Holloway's executor had not then been paid, nor was it then due. If the notes sued on by the bank had been due and sued on by Stapp, and Lagow had been called on to plead to the suit on the day on which he received notice of their assignment, the existence of Holloway's lien would not of itself have constituted a defense, either legal or equitable. Lagow, therefore, had no defense against the notes before he received notice of the assignment, and if he now has a defense it must have come into existence since that time, and is independent of the statute.

That the bank paid no new consideration for the assignment does not affect the question we are now considering. We have seen that it held the notes under an assignment valid between assignor and assignee, and to a maker who had no defense or set-off before notice of the assignment, which he could have made available against the assignor, it is immaterial upon what consideration the assignment may have been made; the bank is none the less an assignee invested with the title to the notes and a right to sue on them in its own name. The statute has not made the inadequacy of the consideration, or even the absence of any consideration at all, for the assignment a valid defense to an action by an assignee, however these circumstances may affect the rights of the maker of the note and of the assignee when the former comes to set up a defense or set-off arising after notice.

But although the statute does not allow a defense or set-off, so existing and capable of being used against the assignor be-

fore notice of the assignment, to be used against the assignee, yet such defenses and set-offs may nevertheless be sometimes allowed upon equitable grounds independent of the statute.

But a party seeking to make a defense or set-off in equity beyond that given by the statute must show affirmatively the existence of the facts necessary to raise the equity.

The bank parted with nothing, and Stapp receiving nothing, for the assignment of the notes, and Lagow having, as we conclude from the evidence, paid the note due July 28, 1875, before notice of the assignment of the last two notes to the bank, and having been subsequently compelled to pay the debt to Holloway's executor, he was thus, without fault on his part, placed in a position in which, if compelled to pay the two notes to the bank, he will be compelled to pay ten or twelve hundred dollars more than he agreed to pay, and to look to Stapp for reimbursement. And, even though Stapp be solvent, Lagow will be placed in a worse condition than he would have occupied if his notes had not been assigned. But if the bank is not permitted to collect the amount of the note paid to Stapp in ignorance of the assignment it will be in no worse condition than it was before it received the notes. It seems, therefore, not to be equitable to compel him to pay both notes to the bank, but he should at most only be required to pay the excess of the last three notes over the amount paid to extinguish Holloway's lien.

But his counsel contend that, having paid the note maturing January 28, 1875, to Stapp, and having also paid the Holloway lien, and as these, with former payments, exceed the price he agreed to pay for the property, he should not be required to pay anything to the bank. This is claimed on the ground that the bank paid nothing for the notes, and consequently is not a holder for value, and they cite *Lee v. Smend, &c.*, 1 Met., 28, and *Bay v. Coddington*, 5 Johnson's Chy., 56, in support of their position.

Those cases are not like this. In the former the contest was between one who had assigned a note for collection and a person who had received it from the assignee of the owner as collateral security for a pre-existing debt, and all that was decided

was that the holder's title could not be upheld against the real owner on the ground that the note had been received for value in the regular course of business, and this is substantially the same as *Bay v. Coddington*.

But here Lagow owed both notes, and he also owed another to Stapp, and having already received notice of the assignment, and being then apprized of the existence of Holloway's lien, and knowing that if he paid the remaining note to Stapp, and should thereafter be compelled to pay that lien, nothing would remain for the bank. He paid to Stapp before maturity the note still held by him. Did he in this violate the rights of the bank?

At the time Lagow paid the note maturing January 28, 1875, to Stapp the debt to Holloway's executor was due, and Lagow might have paid the amount of that note to the executor, and would have had a valid defense if sued by Stapp. He, therefore, had it in his power, by taking that course, to protect both himself and the bank to that extent.

It does not appear that Stapp was then insolvent, or that Lagow had any reason to suppose that he would not pay the Holloway debt; yet as he had it in his power by paying the amount due on the note held by Stapp on that debt, and by taking that course he could have secured the assignee, to that extent, against the hazard of loss by the subsequent insolvency of Stapp and his failure to remove the lien, we have reached the conclusion, though we confess not without some hesitation, that it was his duty to take that course, and that he should have been adjudged liable to the bank for whatever would by that course have been saved to it—that is, the difference between the amount of the last three notes and the amount paid to remove Holloway's lien.

That the bank holds other securities which may be sufficient to satisfy its debt we do not regard as material, but if material, the burden was on Lagow to show the fact as one necessary to raise the equity he is asserting. (*Waterman on Set-off*, section 410, page 468.)

Judgment reversed and cause remanded for a judgment in conformity to this opinion.

Judge Cofer filed, November 19, 1878, the following response of the court to the petition of counsel for appellee for a rehearing:

We attempted to draw the distinction between a legal defense—that is, a defense authorized by the statute—and an equitable defense, or one which could be made independently of the statute. When counsel say Lagow's defense to the notes existed on the making of them, we are prepared to agree with them if they mean an equitable defense; but if they mean that he had all the time a legal defense, then we think they are in error. The deed contains no covenant against encumbrances, but merely a covenant of warranty, and of that covenant there was no breach until long after notice of the assignment, and if he had been sued by Stapp on any of the notes maturing before the debt to Holloway's executor he would have had no defense on account alone of the existence of that lien because Stapp's contract had not been broken in any way, and in order to make a valid defense Lagow would have been compelled to show insolvency, nonresidence, fraud, or some other equitable reason why the chancellor should interpose with his preventive process. And as the chancellor only interferes with the assertion of legal rights so far as necessary to prevent injustice, one who sets up an equitable defense and appeals to the chancellor for aid must not only make out a case showing that, unless equity will interpose, he will suffer injustice, but it must not appear that he had the means of indemnity in his own hands, for it is a maxim in equity that the negligent will not be assisted.

Lagow had it in his power to partially protect himself by paying the note maturing in January, 1875, to Holloway's executor, and thereby showing that he had been compelled to pay the residue of that lien and would lose it unless permitted to retain it out of the notes held by the bank, he would have had, not a legal, but an equitable defense pro tanto against these notes. But instead of this, he neglected to indemnify himself, when he could have done so, and now asks the chancellor to indemnify him at the expense of the bank. In such a case the chancellor will treat Lagow as standing just where he would have stood if he had protected himself as far as lay

in his power, and will not permit him to cast upon the bank the loss that must result from his own laches.

We have not overlooked the fact that this case was tried at law, but treat it as in equity because the whole defense was equitable and not legal.

That the note maturing January, 1875, was paid through the cashier of the appellant does not affect the question. The cashier did only what Lagow directed, and acted in the matter for him, and not for the bank.

Petition overruled.

Vance & Merritt for appellant.

J. W. Lockett and M. Yeaman for appellee.

ADAMS' ASS'EE v. BRANCH, &c.

(Filed September 9, 1880—Not to be reported.)

1. Conveyance of land fraudulent as to vendor and constructively fraudulent as to vendees—In this case the grantor conveyed land to a son and son-in-law who in good faith paid him about one-third of its value, without any knowledge upon their part that the grantor would not be able to pay all his debts. Held—

First. The conveyances were fraudulent as to the vendor and constructively fraudulent as to the vendees.

Second That the vendees had a preferred lien on the land for the purchase money paid by them.

Third. That the vendees must pay all the debts of the vendor existing at the date of their purchases, otherwise the land to be sold and proceeds applied first to pay their preferred claims and then to pay claims of creditors existing at the time they purchased.

2. The renewal of a debt, or obligation therefor, does not amount to a satisfaction or discharge of the original obligation unless there has been some change in the security.

3. Purchaser in good faith from a constructively fraudulent vendee will not be disturbed; but such constructively fraudulent vendee must account for the value of the land sold by him less the amount paid for it by him.

4. Discovery of fraud—See in opinion a statement of facts showing why the chancellor should not search for facts to bar a recovery by reason of lapse of time.

5. Assignee of bankrupt can maintain an action to set aside fraudulent conveyances by the bankrupt, and to subject land so conveyed by him.

Appeal from Nicholas Circuit Court.

Opinion of the court by Judge Pryor.

It is not material to inquire what were the motives prompting Samuel Adams to dispose of his land to his son and son-in-law. He was at the time indebted, and the conveyance of more than two-thirds of his entire estate can not be upheld as against the claims of creditors—one must be just before he is generous—and while a gift to one's children, by way of advancement or otherwise, may be made, if endangering the claims of existing creditors, the chancellor will not hesitate to disregard all such transactions. In this case there was a consideration paid by the son and son-in-law for the land, and we are inclined to conclude from the testimony that they were not apprised of the pecuniary condition of the father, but accepted the lands in good faith, and at least had no knowledge of any design on the part of the father to defraud his creditors. The proof conduces also to show that Samuel Adams, at the date of the bonds in 1872, believed that the price to be paid for this land would satisfy his debts, but in that he was mistaken, and, so far as this record shows, but little of the money received was applied in that way, and his debts are unpaid.

The land sold was worth not less than \$40 per acre when these conveyances were made, or when the bonds were executed. It is, then, an admitted fact that his creditors are unpaid and his children have received deeds to the land for which they paid scarcely one-third of its value, and we see no reason why the sale to the son and son-in-law should not be held as constructively fraudulent, although they did purchase in good faith.

There may be actual fraud on the part of the grantor and constructive fraud on the part of the grantee. If the grantees have an equity in this case, and we think they have, they should be required to pay the claims of creditors existing at the time of the sale to them in February, 1872, or the land conveyed to them should be sold for that purpose. They have a superior equity to the extent of the money paid by them, and the land they purchased should only be sold to pay the debts existing at the time. The fact that some of the debts were renewed did not amount to a satisfaction or discharge of

the original obligation unless there had been some change in the security.

The son, Millard F. Adams, has sold twenty acres of the land received by him, and the purchase having been made, as we believe, in good faith, the purchaser will not be disturbed, but Millard F. Adams must account for its value less the amount paid per acre for it, estimating the whole tract purchased by him at \$1,500. If any part of the purchase money due the father remains unpaid, unless the notes are in the hands of innocent parties, the same will be subjected to the claims of the antecedent creditors.

The conveyance to this land was not made until the year 1874, and no discovery of the fraud was made, or could have been made, by any of the parties until long after the sale took place. The relation of the son and son-in-law to the grantor, and with but little, if any, change in the care of the land, presented no reason for inquiry on the part of the creditors, and this is certainly not a case where the chancellor should search for facts to base a recovery by reason of the lapse of time.

That the assignee can maintain this action has been settled by this court in *Boone v. Hall*, 7 Bush, 66, and in *Payne v. Able*. What debts were in existence at the date of the bond in February, 1872, and are yet unpaid, does not sufficiently or definitely appear, and the case should go to the commissioner in order that this may be ascertained. When this indebtedness is ascertained the land should be sold, first, to satisfy the amount paid by Branch and Adams on their purchase, with interest from day of sale—Adams to account for the land sold by him in the manner already stated—and the balance applied to the claims of creditors; or the appellees, Branch and Adams, may elect to retain the land and pay the debts.

The claims of creditors subsequent to the sale of the land in February, 1872, should be denied. No question of rents, interest or improvements should be allowed unless the land, by reason of the improvements on the tract purchased by either, has, by improvements placed upon it, been enhanced in value beyond \$40 per acre.

Nothing in this opinion is to preclude the appellees from contesting the validity of any claim that may be presented to the commissioner.

Judgment reversed and cause remanded for further proceedings consistent with this opinion. (Wood v. Goff, 7 Bush, 63; Long v. Fisher, 2 Bush, 72.)

Judge Hargis not sitting.

Hargis & Norvell and Reid & Stone for appellant.

Ross & Kennedy for appellees.

GLOVER'S EX'OR v. MYER & HAY.

(Filed December 16, 1880—Not to be reported.)

1. A subscription for stock in a corporation is not released by an amendment to the act of incorporation unless it changes the object of the corporation.

2. When a corporation formally accepts an amendment to its charter, and acts under it, the presumption is that each stockholder individually affirms and accepts such amendment.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Hines.

In 1867 the Elizabethtown & Paducah Railroad Co. was chartered and authorized to construct a railroad from Elizabethtown to Paducah. To the capital stock of this company appellant made an unconditional subscription of \$2,500, on which he paid two calls. Subsequent to this, in 1868, the charter was amended, and, among other things, the company was authorized to build branch roads. In 1873 the charter was again amended, and the name of the company changed to the Louisville, Paducah & Southwestern Railroad Co.

Under the amendment of 1868 the company constructed a branch road from Cecilia to Louisville. Appellees were contractors in the building of this branch, and having obtained judgment against the company and had execution returned no property found, they instituted this proceeding in equity to subject the unpaid portion of the subscriptions made by appellant's testator.

Without alleging fraud or mistake, appellant seeks to escape liability on the ground that certain conditions were attached

to this subscription, and upon the further ground that he was released by the amendments to the charter which undertook to change his contract with the E. & P. R. R. Co., and which amendments he alleges he did not accept. The allegation of appellant's answer is that the amendment of 1868 was obtained without his consent, and that when the company accepted it he refused to pay any more on his subscription. There is no charge that appellant did anything more to manifest his disapproval of the amendments than stated until the filing of the answer in this case in 1878.

It may be conceded that a subscriber for stock is released by a subsequent alteration of the organization of the company where such alteration is fundamental and not contemplated by the charter or by the general law. But whatever the alteration may be the liability for the subscription remains if the amendment affecting the alteration is accepted by the subscriber to the stock, and that acceptance may be manifested by acquiescence as well as by an express acceptance. Especially is this true in a contract between one who becomes a creditor of the company, subsequent to the subscription, and the subscriber for stock. When the amendment, as in this case, is accepted by the majority of the stockholders and the company proceeds to act under it, good faith to the company, as well as to those dealing with it, requires that the non-assenting stockholder should make known his nonacceptance of the amendment in an unequivocal and public manner.

In this instance it is not charged that notice was given in any way to the public of the nonacceptance, nor in fact to the company. The only charge in the answer from which an implied notice to the company could be inferred is that after the amendment appellant refused to pay his subscription. Under these circumstances those dealing with the company had a right to presume an acceptance of the amendment on the part of the stockholders, and to look to the unpaid subscription as a fund out of which their claims were to be satisfied. This is unlike a case where there is no acceptance of an amendment to a charter by the company itself through its corporate organization.

Before an amendment is binding upon the company in its corporate capacity there must be either a formal acceptance or conduct under the amendment by which the acceptance of the company is made manifest; but where the company, as such, formally accepts an amendment, and acts under it, the presumption is that the stockholders individually approve and accept the amendment.

Judgment affirmed.

Judge Cofer not sitting.

John Roberts for appellant.

D. W. Sanders and D. M. Rodman for appellees.

O'BANNON v. CORD.

(Filed December 7, 1880—Not to be reported.)

1. Assignment of errors is sufficient, as set out herein, to raise the question as to the correctness of the judgment appealed from.

2. Devastavit is not established by a judgment against administrator for a debt against his intestate, and a return of no property thereon.

3. Surety of administrator and administrator, when sued as for a devastavit, may plead and show whether he has received assets or not.

4. Administrator illegally appointed, whose appointment has been adjudged to have been void, and the surety in the bond executed by him, may be sued by the legal administrator to recover any assets of his intestate which come to his hand under or by virtue of such illegal or void appointment.

But a creditor has no right to maintain such an action against such illegally appointed administrator or the surety in the bond executed by him, unless he alleges and shows some collusion, default, neglect, refusal or inability upon the part of the legal administrator to take proper steps, by suit or otherwise, to recover such assets.

Appeal from Bath Circuit Court.

Opinion of the court by Judge Hargis.

October 4, 1850, James E. Walker executed his promissory note to his son, James C. Walker, for the sum of \$140, due twelve months thereafter.

The payee assigned the note to Wm. H. Cord September, 1851; and some time thereafter, it does not appear when, the latter assigned it to M. F. Cord, in these words, undated: "Pay to M. F. Cord pursuant to contract between us." Signed W. H. Cord.

On that note M. F. Cord, who, it is contended, is the wife of Wm. H. Cord, but that fact does not appear in the record and it can not be considered, brought suit against him as administrator of said James E. Walker, the obligor in said note, in the Bath Court of Common Pleas, November 1, 1877—twenty-six years after it fell due. To her petition the administrator entered his appearance and interposed a demurrer, which was overruled, and he failing to plead further, a judgment was rendered against him for the amount of the note and interest.

It was alleged in her petition that the administrator, Wm. H. Cord, in 1863, and several times thereafter, promised to pay the note: that he still recognized its validity as existing in full force and virtue, and as administrator promised its payment still.

An execution was issued on her judgment and returned nulla bona.

She then filed a petition in equity against said "Wm. H. Cord as the real administrator and personal representative of James E. Walker," and J. M. Walker and Alcanon J. O'Bannon, stating that the defendant, Wm. H. Cord, was appointed administrator of James E. Walker by the Fleming County Court in 1863; that the defendant, J. M. Walker, was appointed his administrator also by said court in 1869, and executed bond with the defendant, O'Bannon, as his security; and that said court in 1877 revoked and set aside the appointment of the defendant, J. M. Walker, as administrator, and recognized Wm. H. Cord as the real administrator, who gave additional security on his bond.

She averred that assets had come to the hands of defendant, James M. Walker, while he was acting as administrator, and sought judgment against him and O'Bannon for a sum sufficient to pay her judgment against the defendant, Wm. H. Cord, as administrator, obtained in the common law action above mentioned.

Again the defendant, Wm. H. Cord, entered his appearance, waived answer, and the cause was submitted.

No process was served upon defendant, J. M. Walker, but it was executed on O'Bannon, who failed to appear.

A judgment was rendered in her favor against defendant, O'Bannon alone for the sum of \$370, and he has appealed.

The first question of serious importance is, can the appellee maintain an action against the security of J. M. Walker on his bond executed under a void appointment, which has been so adjudged by the Fleming County Court, and no question is raised as to that judgment?

It is urged, however, that no assignment of error has been sufficiently made to raise this question.

The third assignment is in this language: "Appellant had no right to bring this action in which said judgment was rendered against appellant. The right of action, if any, was in the administrator of James E. Walker." While the word appellant is used by mistake in the first part of it for the word appellee, still we think it is sufficient.

The second assignment complains that the petition does not state facts sufficient to constitute a cause of action against him.

Taken together, we think the errors assigned raise the question.

The appellee and her legal advisers evidently labored under the belief that a judgment by default against the administrator Cord, and a return of nulla bona upon an execution issued thereon, established a devastavit against him, and, therefore, she would have the right to institute this action.

While that may have been the effect of such a judgment and returns as it is claimed was held in *Walker v. Kendall, Hardin, 405*, that is not the law now. By section 81, chapter 39, General Statutes, it is provided that "no personal representative shall be liable for more than the amount of assets which have or may come to his hands to be administered on account of having failed to plead or make defense, etc., but the judgment of the court shall only render him liable for the amount of assets in his hands unadministered."

Such a judgment never did bind or conclude any one but the administrator suffering it as to assets. (*Hobbs v. Middleton, 1 J. J. M., 182.*)

His sureties were left free to plead the facts whether he had received assets or not, and, if any, what amount before the

statute *supra*. Since its passage the administrator is in the same attitude as his sureties as to that question.

Now as judgment and return of *nulla bona* does not convict the administrator of willful waste of the property, direct abuse, mal-administration or neglect, then it seems to us that in order to maintain an action by a creditor to recover the value of assets of the deceased from any person, other than the legal administrator, some equitable ground should be shown affecting the debtor and administrator authorizing such an undertaking upon the part of the creditor.

It is the duty of the administrator to collect the assets of the decedent and pay his debts with them, and creditors can not usurp the discharge of such duties.

The creditor in this case had not alleged any default, neglect, or refusal, or inability, upon the part of the legal administrator to take proper steps, either by suit or otherwise, to collect or recover the assets of the decedent, that may have been converted by the defendant, J. M. Walker, under color of administration. Nor is there any collusion upon the part of the administrator and supposed debtor alleged.

In the case of *McCord v. Fisher*, 13 B. M., 196, speaking of suits to recover the unadministered estate of the intestate, or to collect debts, the opinion declares that "such suits can only be maintained by the personal representative, who has qualified as such, if there be one, or, if not, by one or more to be appointed to administer; except in cases where the distributees may sue in equity to recover the estate, or portion thereof, because the administrator refuses to administer upon the estate sued for or to prosecute suits for the recovery thereof.

It was decided in *Ewing v. Handly*, 4 Litt., 353, that creditors may recover assets for the administrator where he will not, or can not, himself recover them.

In the cases of *Griffith, &c. v. Commonwealth*, 1 Dana, 271; *Montmollin v. Gaunt's Adm'r*, 5 Dana, 406; *Pilkinton's Ex'tx v. Gaunt's Adm'r*, 5 Dana, 410, cited by appellee's counsel, the proceedings were against the legal representatives for a failure of duty in the two last cases, and in the first to render

him responsible for goods, etc., that came to his knowledge, but were not collected.

The case cited of *Hefferman v. Forward*, 6 B. Mon., 567, decided that a creditor might bring a suit in equity against the heirs where there had been no administration for twelve months. There has been no case cited, nor have we been able to find any, where a creditor could institute suit to recover the unadministered estate or collect debts, without showing that the administrator, with knowledge of the existence of assets, failed or refused to collect them. There is no averment in the petition that the administrator, Cord, was even unaware of the claim alleged to exist against the defendant, J. M. Walker, and his surety O'Bannon, or that this action was necessary to the discovery of it. There is no fact alleged in the petition showing that the object of the action was for a discovery of any property to which the defendant, Wm. H. Cord, was entitled as administrator. But the purpose of both actions was to secure a judgment upon a stale demand assigned by the administrator himself, in his individual right, to the plaintiff so that he could confess judgment, which he did do, without service of process upon him.

Without all this circumlocution the administrator, Cord, had the right to institute an action against J. M. Walker and his surety on the bond executed by him, under the appointment of the Fleming County Court, for the recovery of any assets belonging to the intestate, as the bond is based upon a valid consideration and is not contrary to public policy or the express letter of the law, and, therefore, it is a good common law bond. And should he recover, it will become his duty to use the amount recovered in payment of the bona fide debts of the intestate, and in pursuance of the requirements of law.

Wherefore, the judgment is reversed and remanded for further proceedings consistent with this opinion.

J. S. Hurt for appellant.

M. M. Teager, J. M. Nesbitt and R. Gudgell for appellee.

CONTINENTAL INS. CO. v. RANDOLPH.

(Filed March 22, 1881—Not to be reported.)

1. The refusal of the lower court to sustain demurrer to the amended petition because it was inconsistent with the original petition was not, in this case, prejudicial to the substantial rights of the defendant, and was not, therefore, a reversible error.

2. Oral evidence is competent to show mistake in reducing a contract of insurance to writing.

3. Evidence as to the character of the instructions received by the agent from the company, where there was no evidence that appellee had knowledge of such instructions, was properly excluded.

The assured had a right to presume that the agent was acting within his authority in fixing the times for the payment of the premiums, unless the contrary instructions of the agent had been communicated to him.

4. Waiver—The failure of the insurance company to require exact proof of loss, and its reliance upon the failure to pay the premiums promptly, was a waiver of the requirement in the policy as to the manner of the proof of loss.

5. The question as to whether or not a mistake was made is a question of fact for the jury.

Appeal from Henderson Court of Common Pleas.

Opinion of the court by Judge Hines.

The refusal of the court below to sustain the demurrer to the first amended petition, because it was inconsistent with the original petition, was not prejudicial to the substantial rights of appellant, and need not, therefore, be considered. The same may be said of the second amended petition. In neither case was there such an absence of discretion as would authorize interference by this court.

The motion to transfer the case to the equity docket came too late. It was not entered until after answer to the second amended petition setting up a mistake, and it is not, therefore, necessary to determine whether the case should have gone to equity if the motion had been made within the time prescribed by the code.

The pleadings having presented the issue as to whether there was a mistake in reducing the contract of insurance to writing, it is clear that oral evidence was competent upon that issue. This is no violation of the familiar rule that a written contract can not be altered, waived or added to without an allegation of fraud or mistake.

Notwithstanding the fact that there is no direct evidence showing that Weinland was acting for appellant, we see no reason for reversing because his letter to appellee was admitted in evidence. It is difficult to perceive how it could have prejudiced appellant as it only purported to inform appellee that he had forfeited his policy by failure to pay the premiums when due.

The refusal of the court to allow the agent to state "according to his best knowledge and belief what the contract was" could not have been prejudicial, since the agent had already been interrogated and had stated to the best of his recollection what passed between appellee and himself at the time of the making of the contract. There is nothing to show that the answer would have been different, or that it would have been more beneficial to appellant than his previous statements.

It was proper to exclude from the jury evidence as to the character of the instructions received by the agent from the company, where there was no evidence that appellee had knowledge of such instructions, and after the agent had stated that he did not remember that he had communicated his instructions to appellee, it was proper to refuse to allow him to answer that he "nearly always" informed the person obtaining insurance what his instructions were. Such evidence, in view of the positive statement of appellee as to what the contract was, could not have altered the result.

Unless it could be shown from the circumstances surrounding the parties at the time the insurance was obtained that the contract was entered into with reference to the "general custom" of insurance companies in regard to such matters, it was not proper to allow evidence of such custom.

The failure of appellant to require exact proof of loss, and the reliance upon the failure to pay the premiums promptly, was a waiver of the requirement in the policy as to the manner of the proof of loss. (*Phoenix Insurance Co. v. Stevenson*, 78 Ky.

It is immaterial whether the agent acted beyond and outside of his instructions in fixing the time for the payment of the premiums unless the instructions to the agent had been com-

municated to appellee. He had a right to presume that the agent was acting within his authority, as that authority was unquestioned so far as the taking of risks and stipulating for the payment of premiums was concerned, and there is no evidence that any communication was made to appellee as to the extent of the agent's authority.

The instruction asked for as to the degree or character of the evidence necessary to establish a mistake may be abstractly correct, but the court properly refused to give it to the jury. The province of the jury was to pass upon the weight of the evidence and to say, from all the evidence admitted by the court, whether there was a mistake. The rule is a good one when it is applied to the chancellor, but has no application to jury trials.

The question as to whether there was a mistake was properly submitted to the jury, and their verdict is amply supported by the evidence.

The fact that the officer issuing the policy did, or did not, know of the mistake can not alter the case. Appellee had a right to rely upon the supposition that the agent had authority to stipulate as to time of payment, and the stipulation having been made under this supposed authority, appellee was under no obligation to make inquiry to ascertain that the officer issuing the policy knew what his agent had done. There would be quite as much reason for saying that the insured should, in the first instance, ascertain what the secret instructions of the agent were.

We see no error in giving or refusing instructions, and as the evidence appears to us to support the verdict the judgment is affirmed.

R. H. Cunningham for appellant.

Vance & Merritt for appellee.

JARVIS v. SATTERWHITE.

(Filed May 5, 1881—Not to be reported.)

A parol license to allow a building to overhang land, given by the owner of the land, although no consideration may have passed, can not be revoked after the expenditure of erecting the building has been incurred.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

It is unreasonable to suppose that the appellee would have constructed his house, with the knowledge of the fact that the cornice was overhanging the ground of the appellant, without the latter's consent, and when it is admitted by the appellant that he gave his consent as to the construction of the cornice so as to cover a part of his lot, but at another part of the building, with the condition that it should be removed thereafter in the event appellant required it, the question in the case is easily solved. The appellant no doubt had forgotten what transpired at the time that consent was given, and when it appears that the plan of the building was submitted to him at the time his consent was obtained, and not only so, that he saw the building progress to completion without any objection, it is manifest that the testimony of the appellee must control the decision of this case. The circumstances are strongly corroborative of appellee's statement, so much so that there is but little doubt left as to its verity.

The party here, relying on the consent of the appellant, has erected a building at considerable cost, and to alter the plan, or reconstruct the building, would necessitate an additional expense, originating alone from the attempt on the part of appellant to revoke the license or permission to construct the house in accordance with the plan shown him. It is too late to recall his action in the premises after the expenditure has been incurred.

It seems to us the only question in this case is, did the appellant consent that the cornice might be constructed so as to overhang his lot? If so, the case is for the appellee. It is not an easement that the appellee is asserting, but on the contrary a license to erect his house, or a part of it, on appellant's land, and whether there was a consideration or not passing to the appellant is immaterial. The building was constructed, and the expenditure made, on the faith of the promise given, and that fact being established by a preponderance of the testimony, the appellant is estopped by his own act; as in the case of an easement where the grant is by parol, if the party entering has expended money in the way of improvements that

must be entirely lost, if the grant is revoked, the chancellor will not interfere at the instance of the owner. (*Dillon v. Crook, &c.*, 11 Bush, —; 14 Serg. & Rowle, 276; 6 Dun., 371; *Walter v. Pat.*)

One who stands by and permits another to purchase land of which he is the owner without asserting claim will be estopped to assert it afterwards against the purchaser.

In the case of *Phillips v. Clark*, 4 Metcalfe, —, where the vendor of the land, who was insolvent, contracted with mechanics to build a house on the land, they erected the building, and the vendee, who had the title, asserted his right to the property because he was the owner and had not authorized the work—this court said, while the building was being constructed the vendee, aware of that fact, stood by and remained silent and permitted the mechanic, who was ignorant of the vendee's claim, to complete the work—the property must be held subject to the mechanic's lien.

If this was an action to enforce an agreement on the part of the appellant, showing his consent in parol, the doctrine contended by him would apply, or if a parol license had been given and an entry made under it, and no expenditures incurred, or where the parties could be placed in statu quo, the chancellor would grant relief, but in this class of cases the chancellor will not, and ought not to, interfere at the instance of one who has induced another to build on his land, and when to remove the building or change the plan would incur a useless expenditure of money to gratify one whose breach of faith is the prime cause for seeking the interposition of the chancellor.

Judgment affirmed.

Russell & Helm for appellant.

Goodloe, Roberts & Humphrey for appellee.

NAPPER v. YAGER.

Must a creditor have a judgment and return of no property thereon before he can commence an action to set aside a voluntary or fraudulent conveyance of land by his debtor?

We concur with the opinion of Judge Bishop, in *Bross v. Cundiff, &c.*, published on pages 51-54 of our July number, and on some future occasion, if some one else does not do so in the meantime, will prepare and publish an article sustaining his decision, that a judgment and return of no property is not now an indispensable prerequisite to the right of the plaintiff to commence such an action.

But in order that we may give those who differ with us the full benefit of all the decisions of the Court of Appeals on this disputed question, we publish the following MS. opinion:

EVANS v. REAY.

(Filed February 1, 1878.)

Appeal from Kenton Chancery Court.

Opinion of the court by Chief Justice Lindsay.

The petition filed in the original action entitled the appellee to judgments against Evans, the husband, on the various causes of action set out.

It also contained averments touching the alleged fraudulent disposition by the debtor to his wife of certain real estate with intent to hinder and delay creditors, entitling him to the order of attachment which was sued out and levied on said realty, and if the proceedings under the attachment had been prosecuted and the actual fraud established the attached property might have been sold in that action. But the attachment was not enforced after the levy, and the rights acquired thereby seem to have been voluntarily abandoned or waived.

The facts averred in this petition did not entitle appellee to a judgment in equity to set aside the conveyances to the wife upon the mere ground that they were voluntary.

First. It did not show that appellee had exhausted his remedy at law by obtaining judgment, suing out execution, and having a return of "no property found," and

Second. It did not even show that the debtor, Evans, had not ample estate outside of Kenton county to satisfy any and all judgments that appellee might obtain.

Therefore, treating the proceeding as a mere attempt to have relief in equity against a voluntary conveyance, the general demurrer to the petition ought to have been sustained.

When the personal judgment was rendered against Evans the original action was out of court for all purposes except the enforcement of the order of attachment, and when it was filed away it could be redocketed for no other purpose than to enforce the same, even if the filing away would not be considered as a waiver or release of the levy.

In this view the petition filed after the return of no property found was not an amendment to a petition in a cause then in court, but an original petition in an action instituted under the provisions of section 474 of Myers' Civil Code of Practice. The order to redocket the first action did not have the effect of reinstating a petition which had accomplished all its purposes, and the statement by appellee that he reiterated all the statements of said

petition did not, and could not, make the same part of the original, but miscalled amended, petition he was then prosecuting.

This petition presented no cause of action whatever against Mrs. Evans. It did not show that she had the title to the realty, either as a voluntary or fraudulent grantee. The recital that she still held fraudulently was not a specific averment, and even if it was, it rested on no statement of facts and was but the mere conclusion of the pleader.

Instead of refusing to allow appellants to answer this petition, and summarily recovering judgment against them, their demurrer should have been sustained, and the order redocketing the original action should have been set aside.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.

Simmons & Schmidt and A. Duvall for appellant.

Fisk & Fisk for appellee.

THE

KENTUCKY LAW REPORTER.

OCTOBER, 1881.

MUST A CREDITOR HAVE A JUDGMENT AND RETURN
OF NO PROPERTY FOUND BEFORE HE COMMENCES
AN ACTION IN THIS STATE TO SET ASIDE A FRAUD-
ULENT OR VOLUNTARY CONVEYANCE OF LAND?

The right of a creditor to sue to set aside a fraudulent conveyance was first created in this State by "An act to prevent Frauds and Perjuries," approved December 14, 1796 (1 Litt., 371, and M. & B., 734), which provides as follows:

"Section 2. Every gift, grant or conveyance of lands, tenements or hereditaments, goods or chattels, or of any rent, common or profit of the same, by writing or otherwise; and every bond, suit, or judgment, or execution, had or made and contrived of malice, fraud, covin, collusion, or guile, to the intent or purpose to delay, hinder or defraud creditors of their just and lawful actions, suits, debts, accounts, damages, penalties, or forfeitures, or to defraud or deceive those who shall purchase the same lands, tenements or hereditaments, or any rent, profit or commodity out of them, shall be from thenceforth deemed and taken only as against the person or persons, his, her or their heirs, successors, executors, administrators or assigns, and every of them, whose debts, suits, demands, estates and interests, by such guileful and covinous devices and

practices aforesaid, shall, or might be, in anywise disturbed, hindered, delayed or defrauded, to be clearly and utterly void." * * *

Said statute of 1796 created the right of the creditor to sue to set aside a fraudulent conveyance, but it must be borne in mind throughout this discussion that said statute did not create, provide or regulate the remedy for the enforcement of that right.

When creditors instituted suits to enforce the right conferred by the statute of 1796 the courts of chancery adopted the general rule that when the complainant's demand was merely legal he was required to have a judgment and return of no property found before he filed his bill to set aside a fraudulent conveyance made by his debtor (*Bradley v. Buford, Sneed*, 12; *Gilpin v. Davis*, 2 *Bibb*, 416; *Scott v. McMillen*, 1 *Litt.*, 302). Many other cases in proceedings under the statute of 1796 might be cited.

But if the complainant's demand was equitable, or the debtor was a nonresident of this State, courts of chancery assumed and exercised jurisdiction and set aside fraudulent conveyances made by such nonresident debtor in cases wherein the complainant had no judgment or return of no property found. (*Scott v. McMillen*, 1 *Litt.*, 302; *Wilcox, Dickerman & Co. v. Carey & Hart, &c.*, 9 *Dana*, 297.)

The rules, as above indicated, adopted by the courts in proceedings under the statute of 1796 were continued and observed until they were changed by "An act the better to provide against fraudulent purchases and fraudulent sales and conveyances of property to the prejudice of creditors," approved February 15, 1838 (*Loughborough's Statutes*, 116; *Session Acts*, 212), which provided as follows:

"Section 2. When any person shall sell or convey or otherwise dispose of his, her, or their lands, goods, wares, merchandise, choses in action, or other property, or shall suffer or permit the same to be sold, with the fraudulent intent of cheating and defrauding creditors or hindering and delaying them in the collection of their debts, the courts of chancery of this Commonwealth shall have power and jurisdiction in favor of

any creditor, whether the debt be due or be not due, or be or not in judgment, to set aside the fraudulent sale, conveyance or other disposition, and subject the property to the payment of the debt, and for that purpose to attach the property and make all necessary or proper orders for the safety and forthcoming of the same."

Said statute of 1838 both enlarged the right of the creditor and regulated the remedy for the enforcement of that right by providing that "the courts of chancery in this Commonwealth shall have power and jurisdiction in favor of any creditor, whether the debt be due or be not due, or be or not in judgment, to set aside the fraudulent sale, conveyance," etc.

It is clear that the statute of 1838 repealed the chancery rule adopted by the courts in proceedings under the statute of 1796 requiring the complainant to have a judgment and return of no property found before he filed his bill, and instead of that rule so enlarged the right of the creditor and regulated the remedy for the enforcement of that right as to give the creditor the right to sue, and conferred power and jurisdiction upon the courts of chancery to render judgment in such cases, when the creditor had no judgment or return of no property found.

The right of the creditor, first created by the statute of 1796, enlarged by the statute of 1838, and the remedy—power and jurisdiction of the courts of chancery of this Commonwealth—provided, and regulated by said statute of 1838 for the enforcement of that right, were continued without change and in force up to and at the time the Code of Practice of 1851 and Revised Statutes of 1852 took effect.

I shall now proceed to show:

1st. That the right of the creditor, first created by the statute of 1796 and enlarged by the statute of 1838, was not repealed or abridged, but was continued in force by the Revised and General Statutes.

2d. That the remedy for the enforcement of that right, provided and regulated by the statute of 1838, was not repealed or abridged, but was continued in force by the Code of 1851, by it as re-adopted in 1854 and also by the Code of 1877.

1st. As to the right of the creditor.

The right of the creditor to sue to set aside a fraudulent or voluntary conveyance as it existed at the time the Revised Statutes took effect was continued in force and re-enacted by the Revised Statutes, chapter 40, title "Fraudulent Conveyances and Devises," and also by the General Statutes, chapter 44, same title. (See note at the end of this article.)

The omission of the words "whether the debt be due or be not due, or be or not in judgment" from said chapters of the Revised and General Statutes has no significance whatever, because said statutes were intended to continue and declare the right of the creditor, and left it entirely to the Code to provide the remedy for the enforcement of that right. It is very clear that said omitted words relate exclusively to and regulate the remedy, power and jurisdiction of the court, by declaring that "the courts of chancery of this Commonwealth shall have power and jurisdiction in favor of any creditor, whether the debt be due or be not due, or be or not in judgment, to set aside the fraudulent sale, conveyance," etc.

2d. As to the remedy:

The remedy, provided and regulated by the statute of 1838, declaring that "the courts of chancery of this Commonwealth shall have power and jurisdiction, in favor of any creditor, whether the debt be due or not due, or be or not in judgment, to set aside a fraudulent conveyance" as it existed at the time the Code of 1851 took effect, was continued in force by that Code and by it as re-enacted in 1854 and also the Code of 1877 is clearly shown by the following sections:

The Code of 1851 provided:

"Section 4. The plaintiff may prosecute his action by equitable proceedings in all cases where courts of chancery before the adoption of this Code had jurisdiction, and must so proceed in all cases where such jurisdiction was exclusive."

Section 4 of the Code of 1854 is the same as in the Code of 1851.

"Section 4. The plaintiff may prosecute his action by equitable proceedings in all cases where courts of chancery before the adoption of this Code had jurisdiction, and must so proceed in all cases where such jurisdiction was exclusive.

The Code of 1877 provides:

"Section 6. Unless otherwise provided by this Code or other statute:

"1st. Actions of which courts of chancery had jurisdiction before the first day of August, 1851, may be equitable; and actions of which such jurisdiction was exclusive must be equitable.

"2d. All other actions must be ordinary."

As the plaintiff, creditor without judgment or return of no property found, had an undoubted right at all times from 1838 up to August 1, 1851, when the Code of 1851 took effect, to prosecute an action by equitable proceedings in the courts of chancery to set aside a fraudulent or voluntary conveyance, and the courts of chancery had power and jurisdiction to enforce that right, both the right and the power or jurisdiction to enforce it were preserved and continued in force by said section 4 of the Code of 1851, and again preserved and continued in force by said section 4 of the Code of 1854, and still again preserved and continued in force by said section 6 of the Code of 1877.

Instead of repealing or abridging the right of the plaintiff and the power and jurisdiction of the courts to the extent, and only to the extent, that both the right and the jurisdiction of the court were enlarged by the act of 1838, said section 4 of the Codes of 1851 and 1854 and section 6 of the Code of 1877 expressly preserved and continued in force both the right of the plaintiff as to the remedy and the jurisdiction of the court as enlarged by said statute. Otherwise said sections of the Codes mean precisely the contrary of what is expressly declared therein.

The Revised and General Statutes, chapter 21, provide as follows:

"Section 22. When a law which may have repealed another shall be repealed the previous law shall not be revived unless the law repealing it be passed during the same session."

The statute of 1838 certainly repealed so much of the previous law as required the plaintiff to have a judgment and return of no property found before he filed his bill in a court of chancery to set aside a fraudulent or voluntary conveyance made by his debtor. If the statute of 1838 was repealed to

any extent by the Revised Statutes or General Statutes, or by the Code of 1851, 1854 or 1857, I would be much obliged to anyone, who so contends, if he will inform me, first, when and how that statute was so repealed; and, second, when and how so much of the previous law was revived or re-enacted as required the plaintiff to have a judgment and return of no property found before he commenced such an action.

After mature consideration I affirm the propositions, first, that so much of the statute of 1838 as enlarged the right of the plaintiff by conferring upon him the right to sue in such cases "whether the debt be due or be not due, or be or not in judgment," has not been repealed at any time or in any manner; and, second, that if it has been repealed, the previous law requiring the plaintiff to have a judgment and return of no property found before he commenced his suit to set aside a fraudulent or voluntary conveyance has not been revived or re-enacted at any time or in any manner whatever. And I further affirm the proposition that, unless conferred by said statute of 1838 and section 4 of the Code of 1851, section 4 of the Code of 1854, and section 6 of the Code of 1877, no court in this State has had any jurisdiction since August 1, 1851, to set aside a fraudulent or voluntary conveyance, and that, independently of said statute and sections of the Codes, the Codes have wholly failed to provide any remedy in such cases, and a court of equity has no jurisdiction at this time to set aside a fraudulent or voluntary conveyance at the suit of a creditor, either with or without a judgment and return of no property found.

I am aware that it is contended by learned judges and lawyers, who differ with me on the questions involved in this discussion that a suit by a creditor to set aside a fraudulent or voluntary conveyance, made by his debtor, is what is technically denominated in England and many of the American States a "creditor's bill"; that in proceedings on a "creditor's bill" the plaintiff must have a judgment and return of no property found thereon before he files his bill; that section 474 of the Code of 1854 and section 439 of the Code of 1877 expressly provide for and authorize a "creditor's bill" to be filed in this State only by a plaintiff who has a judgment

and return of no property found, and, therefore, that said sections of the Codes require that the plaintiff in an action to set aside a fraudulent or voluntary conveyance must have a judgment and return of no property found before he commences his action.

Cases may be cited almost without number wherein the courts of England and of the American States have decided that the plaintiff must have a judgment and return of no property found, on a legal demand, before he files his creditor's bill, and the Codes of 1854 and 1877 of this State, sections 474 and 489, expressly provide for and authorize a "creditor's bill" on a judgment and return of no property found, as follows:

"Section 489 [474]. After an execution of fieri facias, directed to the county in which the judgment was rendered or to the county of the defendant's residence, is returned by the proper officer, either as to the whole or part thereof, in substance no property found to satisfy the same, the plaintiff in the execution may institute an equitable action for the discovery of any money, choses in action, equitable or legal interest, and all other property to which the defendant is entitled, and for subjecting the same to the satisfaction of the judgment; and in such actions, persons indebted to the defendant, or holding money or property in which he has an interest, or holding evidences or securities for the same, may also be made defendants."

It will be observed that the contention of those who differ with me is based upon the assumption that an action to set aside a fraudulent or voluntary conveyance, is a "creditor's bill." If this assumption is a true premise the contention is logical in statement and conclusion. I shall now proceed to show that the contention is based upon a false premise—upon the false assumption that an action to set aside a fraudulent conveyance is a "creditor's bill."

I affirm the proposition that an action to set aside a fraudulent or voluntary conveyance is not, and does not possess, a single element of a creditor's bill. I mean and refer to that class of creditors' bills in which a judgment and return of no property found is required before the bill is filed.

What is a creditor's bill?

Bispham's Principles of Equity defines a creditor's bill as follows:

"Section 525. Creditor's bills are bills filed by creditors for the purpose of collecting their debts out of real or personal property of the debtor, under circumstances in which the process of execution at common law could not afford relief. This equitable remedy may be made use of during the lifetime of the debtor or after his death. Creditors' bills filed against the estate of a decedent generally, though not necessarily, partake of the nature of administration suits, and will be considered in that connection. Creditors' bills of the first class—i. e., against a debtor during his lifetime—are now to be noticed.

"Section 526. Creditor's bills of the first class may be defined to be bills filed by creditors who seek to satisfy their debts out of some equitable estate of the defendant, which is not liable to levy and sale under an execution at law, or out of some property which has been put beyond the reach of ordinary legal process. They may be also made use of for the purpose of obtaining discovery of the debtor's property. * *

"Section 527. * * * As this remedy is based upon the incapacity to obtain relief at common law, it is incumbent upon the complainant, as a general rule, to show that he has exhausted his common law remedies before resorting to equity. This is generally done by showing that he has obtained a judgment, has issued execution, and that there has been a return thereon of nulla bona. And these facts must be alleged in the bill to give the court jurisdiction, or otherwise it would not appear but that the party had a complete remedy at law. This rule, though a stringent one, is nevertheless not without exceptions." (Story's Eq., sections 546 to 549.)

But what constitutes a creditor's bill or action in this State, as well as the object and scope of the action, is fully defined by said sections 474 and 489 of the Codes of 1854 and 1877.

A creditor's bill, on a return of no property found, under section 489 of the Code of 1877 always seeks the discovery of interests or property to which the defendant debtor is entitled, and to subject the same to the payment of his judgment.

An action to set aside a fraudulent or voluntary conveyance never seeks the discovery of interests or property to which the defendant is entitled; never seeks to subject interests or property to which the defendant is entitled to the payment of the plaintiff's debt; but, on the contrary, it always seeks to subject property in which the defendant debtor has no interest, and to which he is not entitled. An action to set aside a fraudulent or voluntary conveyance is frequently united with a creditor's bill or action on a return of no property found, but it does not, by any means, follow, because the two actions may be united, that they are subject to the same regulations in any essential particular—in one the return of no property is the test fact upon which the action is based, whilst in the other the fraudulent conveyance is the test fact upon which the action is based—in one the action is not barred by any statute of limitations, and may be commenced at any time after the return, so long as the judgment itself is not barred, whilst the other may be barred by the statute of limitations, and must be commenced within five years after the cause of action accrued, and within ten years after the perpetration of the fraud (General Statutes, chapter 71, article 3, sections 2 and 6). The dissimilarity of these two actions is so striking—one seeking to subject interests and property to which the defendant debtor is entitled, the other seeking to subject property in which the defendant debtor has no interest, and to which he has no title whatever, etc.—that it seems to me to be almost incredible that learned judges and able lawyers should ever treat an action to set aside a fraudulent or voluntary conveyance as a creditor's bill, or as an action provided for by said section 474 of the Code of 1854, or said section 439 of the Code of 1877. It is very clear that said sections 474 and 439 do not confer any jurisdiction upon or recognize the existence of any jurisdiction in a court of equity to set aside a fraudulent or voluntary conveyance at the suit of the creditor of the grantor, and that if the courts of equity have no jurisdiction in such cases independently of said sections they have no jurisdiction at all in such cases.

By accepting the unwarranted assumption that an action to set aside a fraudulent or voluntary conveyance was a creditor's bill and subject to the provisions of section 474 of the Code of 1854 and section 439 of the Code of 1877, and entirely over-

looking the provisions of the statute of 1838, and the effect of section 4 of the Codes of 1851 and 1854 and section 6 of the Code of 1877, the learned judges of the Court of Appeals of this State have, in my opinion, erred in *Napper v. Yager*, 8 Ky. Law Rep., 49, and *Evans v. Reay*, 8 Ky. Law Rep., 193.

I concur in the able argument of the Hon. W. S. Bishop in his opinion in *Bross v. Cundiff*, in the McCracken Common Pleas Court, published in 8 Ky. Law Rep., 51-54, and ask all who read this article to read his opinion also, as I have rather avoided repeating the arguments presented so ably by him. Feeling that his opinion and what I have herein written will be conclusive of the question involved in this discussion, I respectfully ask any who may differ with us to prepare and send to me an article on the other side and I will cheerfully publish it.

It results from this discussion—

1st. That the right of a creditor to sue to set aside a fraudulent conveyance was first created in this State by the act of 1796; that in proceedings under that act the courts of chancery, as a general rule, required the creditor, whose debt was legal, to have a judgment and return of no property found before he filed his bill.

2d. That the statute of 1838 enlarged the right of the creditor, and provided and regulated the remedy for the enforcement of that right, and conferred power and jurisdiction upon the courts of chancery in such cases "whether the debt be due or be not due, or be or not in judgment," thereby repealing so much of the previous law or rule as required the creditor to have a judgment and return of no property found before he filed his bill.

3d. That the right of the creditor, first created by the statute of 1796 and enlarged by the statute of 1838, was not abridged or repealed, but was continued in force by the Revised and General Statutes: that if the Revised or General Statutes could be construed so as to abridge or repeal any part of the statute of 1838 such repeal could not, and would not, revive the previous law or rule requiring the creditor to have a judgment and return of no property found before he filed his bill.

4th. That the remedy provided and regulated by the statute of 1838, in force at the time the Code of 1851 took effect, was not abridged or repealed by that or the subsequent Codes, but was continued in force by section 4 of the Code of 1851, by section 4 of the Code of 1854, and by section 6 of the Code of 1877.

5th. That, independently of the statute of 1838 and said sections 4 of the Codes of 1851 and 1854 and section 6 of the Code of 1877, the courts of equity in this State have not had any jurisdiction in such cases at any time since the Code of 1851 took effect.

6th. That, an action to set aside a fraudulent or voluntary conveyance is not a "creditor's bill," was not regulated by section 474 of the Code of 1854, and is not now regulated by section 489 of the Code of 1877; that said sections confer jurisdiction upon the courts of equity to discover and subject interests and property to which the defendant debtor is entitled; whereas, on the contrary, an action to set aside a fraudulent or voluntary conveyance never seeks to discover or to subject any interest or property to which the defendant debtor is entitled, but always seeks to subject interests or property in which the defendant debtor has no interest whatever, and to which he has no title whatever, having irrevocably parted with all his interest in, and title to, the interest or property sought to be subjected by his fraudulent or voluntary conveyance.

It will not do for those who differ with us to affirm that the statute of 1838 has been superseded, abrogated or repealed, in so far as it provided and regulated the remedy by conferring power and jurisdiction upon courts of chancery to enforce the right of the creditor, declared by that statute, "whether the debt be due or be not due, or be or not in judgment;" or that the previous law or rule adopted in proceedings under the statute of 1796, repealed by the statute of 1838, has been revived or re-enacted; or that the Codes, independently of section 4 of the Code of 1851, section 4 of the Code of 1854, and section 6 of the Code of 1877, provided or regulated a remedy, or conferred power or jurisdiction upon or recognized the existence of power or jurisdiction in the courts of equity, to enforce the

right of a creditor to set aside a fraudulent or voluntary conveyance, as that right is declared and continued in the Revised and General Statutes, so far as may be necessary to pay his debt, unless they sustain their affirmation by showing specifically when, by what, and in what manner, what they affirm has been effected or accomplished.

I deny the truth of each of the affirmations of those who differ with us as above indicated, and will stand by that denial until satisfactory proof of each of said affirmations is produced.

W. P. D. BUSH.

Note—Chapter 40, Revised Statutes, is as follows:

"Sec. 1. That every gift, conveyance, assignment, or transfer of, or charge upon, any estate, real or personal, or right or thing in action, or any rent or profit thereof, made with the intent to delay, hinder, or defraud creditors, purchasers, or other persons, and every bond or other evidence of debt given, suit commenced, decree or judgment suffered, with like intent, shall be void as against such creditors, purchasers and other persons.

"This section shall not affect the title of a purchaser for valuable consideration unless it appear that he had notice of the fraudulent intent of his immediate grantor or of the fraud rendering void the title of such grantor."

"Sec. 2. Every gift, conveyance, assignment, transfer, or charge made by a debtor of or upon any of his estate, without valuable consideration therefor, shall be void as to all his then existing liabilities, but shall not, on that account alone, be void as to creditors whose debts or demands are thereafter contracted, or as to purchasers with notice of the voluntary alienation or charge, and though it be adjudged to be void as to a prior creditor, it shall not, therefore, be declared to be void as to such subsequent creditors or purchasers."

The above sections are continued as sections 1, 2, in chapter 44 of the General Statutes.

KENTUCKY COURT OF APPEALS.

SIMRALL v. GRANT, &c.

(Filed September 10, 1881.)

1. A sale of personal property levied on to satisfy an ordinary execution can not be suspended by a court of equity until the remedy at law has proved inadequate.

2. But in a controversy between a trustee and a cestui que trust a court of equity will entertain jurisdiction on the complaint of either, when made in reference to the trust estate.

Where an execution is levied on trust estate by a creditor of the trustee the interest of the trustee is in direct conflict with the interest of the cestui que trust, and a court of equity will entertain jurisdiction.

3. On a motion upon the whole case to dissolve an injunction, although the entire controversy is involved, the decision of the court is not final and does not dispose of the case on its merits.

In this case the cestui que trust enjoined the levying of an execution against the trustee, individually, upon the trust estate. The motion of the execution plaintiff to dissolve the injunction was overruled and thereupon the court rendered a final judgment perpetuating the injunction. That judgment is reversed.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Pryor.

An action in equity by the wife, Julia Grant, obtaining an injunction to prevent the sale of her trust property under an execution against her husband. This action in equity is really between the trustee and the cestui que trust, the creditor of the trustee insisting that it is the individual property of the trustee, and subject to the payment of his debts, and not only so, has levied his execution on the trust property, and is about to dispose of it. There must be some impediment to the remedy at law before the jurisdiction of the chancellor can be invoked to stay a sale of personal property levied on to satisfy an ordinary execution.

Generally the remedy is ample and complete at law, but where the controversy is between the trustee and the cestui que trust a court of equity will entertain jurisdiction on the complaint of either when made with reference to the trust estate.

It is true the husband, who is a nominal plaintiff, is the trustee, but still the creditor has presented an issue in which the right of the trustee, who is the husband, is in direct conflict with the right of the wife, and the latter is seeking the aid of the chancellor to protect her in the trust property, alleging that she has no means but this trust estate, and to deprive her of the property would be to leave her destitute of any household furniture for the comfort of herself and family.

She is a married woman, and wants the trust declared, and the rights of her husband, if any, determined.

We think the chancellor has jurisdiction. Shortly after this petition was filed and the injunction obtained a motion was made by the appellant to dissolve it on the face of the papers. This motion having been overruled the appellants filed an answer raising an issue as to the rights of the wife, and gave

notice that on a certain day they would move to dissolve on the whole case.

By section 291 of the Code, after an answer filed by the party enjoined, he may give notice of his motion, to be made in not less than ten days, to dissolve on the whole case, and on that motion any competent evidence may be heard; and that section further provides that "the court shall not be bound to take the answer as true."

When the case was called each party declined to introduce any testimony, the plaintiff objecting to a submission and the appellants insisting upon a hearing. The case was then submitted, the chancellor rendered a final judgment establishing the trust, and perpetuating the injunction.

It is insisted by the appellants that this judgment was premature, as the case did not stand regularly for trial on its merits, and that, although testimony might have been heard as to the principal issue, all the action the court could properly take was to overrule the motion to dissolve. Whether, where the entire controversy is necessarily involved on a motion to dissolve on the whole case, the decision of the court on the motion is final is the question raised.

The chancellor certainly had the right to hear testimony as to the claim of each party, and in passing on the question must necessarily determine the rights of property to be in the one or the other. Yet if he dissolves the injunction only, or overrules the motion to dissolve, the order is not final, and ordinarily the dissolution of the injunction does not determine the merits of the controversy or settle the rights of the parties, but the questions are left for future adjudication. The case was not submitted for final judgment, and did not stand for trial except on the motion to dissolve.

Section 293 of the Code provides that "after hearing the motion the court or judge shall overrule it, or dissolve or modify it according to the rights of the case." This section controls the action of the chancellor, and the subsequent section, 294, providing that but one motion shall be made to dissolve on the whole case, shows clearly that the case, after the motion has been heard, may be finally disposed of on its

merits, although it may involve a reinvestigation of the identical question disposed of on the motion.

The record shows that the case was submitted upon the motion to dissolve on the whole case and for judgment. The appellant insists that it was for a judgment on the motion, and in this view we concur.

The Code expressly provides that the court, on a motion to dissolve, is not bound to take the answer as true, and when the cause was submitted for judgment it meant a judgment on the motion. Counsel would not have submitted the case on petition and answer when the result was so manifest.

The court, instead of rendering a final judgment (the case not standing for trial), should have entered an order overruling the motion to dissolve.

The judgment is, therefore, reversed and cause remanded for further proceedings consistent with this opinion.

R. D. Handy and Simrall & Simrall for appellant.

McKee & Finnell and Hallam & Perkins for appellees.

SALISBURY v. COMMONWEALTH.

(Filed March 8, 1881.)

1. Application for continuance because of absence of material witnesses—Section 189 of the Criminal Code, which provides that "when the ground of application for a continuance is the absence of a material witness, and the defendant makes affidavit as to the facts which such witness would prove, the continuance shall be granted unless the attorney for the Commonwealth admit upon the trial that the facts are true," does not destroy the power of the court to postpone the trial to any time in the same term, if the party applying is given a reasonable opportunity to procure the presence of his absent witnesses and prepare for trial.

The party applying must show, first, that the witnesses are material; and second, that he has used due diligence to have them present.

2. The introduction of counter affidavits contradictory of the statements made in the party's affidavit of what his absent witnesses would prove is contrary to law, and deprives accused persons of the right to have the witnesses of the facts brought face to face.

3. "A private person may make an arrest where he has reasonable grounds for believing that the person arrested has committed a felony." (Criminal Code, section 37.)

A private person illegally deputized to execute a warrant of arrest, is not deprived thereby of his right to make an arrest where he has reasonable grounds for believing the person arrested has committed a felony.

Appeal from Floyd Circuit Court.

Opinion of the court by Judge Hargis.

John Morris was killed in the county of Floyd on the 9th of February, 1881.

Five days thereafter the appellant and Wm. Banks were arrested, tried and held, without bail, by an examining court to answer for the murder of Morris.

On account of the insufficiency of the jail they were sent to the jail of Boyd county, which is about eighty miles from Floyd courthouse, where they were indicted on the 30th of March.

Two days before the indictment was found they were lodged in the Floyd county jail.

On the day after the indictment was filed in court the case was called for trial and they applied for a continuance upon their joint affidavit, which was refused, but a postponement for ten days was allowed for preparation.

By direction of the appellant's counsel subpoenas were issued to the several counties where his witnesses resided.

At the end of the postponement the case was again called for trial, and again the appellant moved for a continuance on the ground of continued absence of his witnesses upon whom, he alleged, the subpoenas had not been served because the ministerial officers of the counties where they resided had refused to accept or execute them.

His motion was overruled, a separate trial awarded, and he was convicted of the offense of murder and sentenced to the penitentiary for life.

From that sentence he appeals to this court, and here complains:

1st. That he was not allowed a legal opportunity to procure the presence of his witnesses whose testimony was material to his defense. He stated in his affidavit for a continuance in substance that J. M. Pigman, a justice of the peace of Letcher county, had, on the oath of his co-defendant, Wm. Banks, issued two warrants for the apprehension of the deceased, charging him in one with maliciously stabbing Emory Campbell in Perry county, and in the other with maliciously shooting

and wounding Banks in Floyd county; and that the warrants were placed in the hands of A. H. Amburgy, sheriff of Letcher county, who deputized Banks, in writing entered on the backs of the warrants, to execute them, and at the same time summoned the appellant to go with Banks as a guard to aid him in the act.

That he could prove these facts by those officers who resided near sixty miles from Floyd courthouse.

And he could also prove by Emory Campbell and Joseph Stacy, of Perry county, that "deceased, in 1875, in Perry county, Kentucky, willfully and maliciously stabbed and wounded the said Campbell, and not in his (Morris') self-defense."

He stated that he could prove by Hallifield and Combs that after Morris was killed the appellant and Banks "sent a man to have a warrant obtained for them and a guard summoned to protect them so that they might surrender and have an examination of the charge of them having killed Morris before the proper authorities, and that the party had gone to obtain the warrant when they were arrested by Hoover and his posse."

It is contended by appellant's counsel that the clause of section 189 (Criminal Code) which reads: "When the ground of application for a continuance is the absence of a material witness, and the defendant makes affidavit as to the facts which such witness would prove, the continuance shall be granted unless the attorney for the Commonwealth admit upon the trial that the facts are true," destroys the power of the court to postpone the trial to any time in the same term, when the ground of application for a continuance is such as it contemplates.

To this construction we do not agree, because, if the party should be given a reasonable opportunity to procure the presence of his absent witnesses and prepare for trial, it is unquestionably within the legal power of the court to order a postponement to a day in the same term. (Section 188, Criminal Code).

There are, however, but two facts to determine about the question of continuance in this case:

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1st. Were the witnesses material?

2d. Did the appellant use due diligence in his effort to have them present? (*Morgan v. Commonwealth*, —Bush—.)

Section 35, Criminal Code, says: "An arrest may be made by a peace officer or by a private person," and section 37, "a private person may make an arrest where he has reasonable grounds for believing that the person arrested has committed a felony."

There is no provision of the Code authorizing any other person than a peace officer to make an arrest in obedience to a warrant of arrest.

Hence the authority to execute the warrant attempted to be conferred by the sheriff, Amburgy, upon Banks, a private person, was illegal, and, of itself, furnished no protection to Banks and the appellant. But the fact that the sheriff had no legal authority to deputize Banks to execute the warrant, and the possession of it by the latter, did not deprive the one having reasonable grounds for believing that the deceased had committed a felony of the right to arrest him.

For, without any warrant, a private person may make an arrest when such is the fact (sections 37 and 46, Criminal Code), and the illegal possession of a warrant does not alter the case.

But the existence of reasonable grounds, either by Banks or the appellant, for believing that the deceased had committed a felony furnished no authority or right to the other to aid in making the arrest unless he likewise had reasonable grounds so to believe. Therefore, the summons of the appellant by the sheriff, and by Banks to aid the latter in making the arrest was illegal, because none but an officer making an arrest may summon persons to aid in it (section 41, Criminal Code). But it was competent for the appellant to show that the warrants were legally issued and placed in the sheriff's hands, and that the latter summoned him to aid in making the arrest. Yet, notwithstanding he may show these facts on a future trial, if he should not also show that he had reasonable grounds for believing that the deceased had committed a felony, they will avail him nothing; but in the presence of such proof they would be competent to illustrate his motive.

It was material to the appellant's defense, in view of the law as above expounded, to have not only Pigman and Amburgy, but Campbell and Stacy present, by whom he swears in his affidavit he can prove the deceased had committed a felony for which he was attempting to arrest him when his death ensued.

While private persons may make arrests on the ground named, still they can not make the occasion a pretext for wreaking their vengeance upon a person known to him to be guilty. Nor can any unnecessary force or violence be lawfully used in making the arrest.

On the trial the Commonwealth introduced evidence tending to show that appellant and Banks, heavily armed, resisted arrest for the space of several hours before they surrendered. This testimony disclosed the materiality of the absent witnesses, Hallifield and Combs, whose evidence, if true, would to a great degree negative any design upon the part of Banks and the appellant to avoid arrest and examination.

The introduction of counter affidavits contradictory of the statements made in appellant's affidavit of what his absent witnesses would prove was contrary to law, and if indulged would frequently deprive accused persons of the right to have the witnesses of the facts brought face to face, and the benefit of a personal examination of them in open court, which so often conflicts with and explodes the biased views and misapprehension of interested parties.

Such a practice would substitute hearsay for primary evidence and violate the letter and spirit of section 189 of the Criminal Code, which secures to the defendant the right to a continuance, or a reasonable opportunity to procure the presence of his witnesses, if, "where the ground of application is the absence of a material witness and the defendant makes affidavit as to the facts which such witness would prove."

We believe he used due diligence. The law did not require him to anticipate his indictment, and prepare his defense before it was found. He was imprisoned at such a distance from the place of trial and the residence of his witnesses, and the time allowed was so short for procuring their presence that greater diligence than he exercised could hardly be required of

him. He caused the subpoenas to be issued and offered to the proper officers for execution, who illegally refused to accept them. He was in jail and could not have foreseen, nor was he required to expect, the unlawful action of the officers in refusing to execute the process, nor did he have time to receive information of their action and repeat his effort to have his witnesses present on the day fixed for the trial by the order of postponement.

The court, therefore, erred in not postponing the case for a greater length of time or granting a continuance.

The indictment is good, and the notice to compel the State to elect upon which count in the indictment it would proceed was properly overruled. The charge of a conspiracy between the defendants to commit the offense for which they were jointly indicted did not constitute a separate and single offense, but it constituted an aggravating element of the one for which they were arraigned, and it was made to prevent the defendants from testifying for each other, as, without the allegation, although the fact may exist, each would be a competent witness for the other.

Subsection 3, section 165, does provide that a demurrer is proper "if more than one offense be charged in the indictment," etc.

But it must be construed with section 234, which authorizes a conspiracy to be charged against two or more persons jointly indicted for the same offense.

Such a construction of these sections as is sought to be placed upon them would make them destroy each other.

For the legislature certainly never intended, if a conspiracy be charged in an indictment against two or more for the same offense, that that would render the indictment obnoxious to subsection 3 of section 165, nor that those who are charged and proven to be guilty of a conspiracy in the perpetration of an offense can escape the denunciation of section 234 and become witnesses for each other.

It was error to allow the Commonwealth to prove that the deceased had been attending upon his wife's sick mother for several days before his death. It was proper to allow the testi-

mony as to where he had been, but not as to his purpose in being there. It had no connection with any issue in the trial. It threw no light upon any act or motive of the appellant, but tended alone to arouse and touch the sympathy of the jury.

On the motion of appellants, the court ought to have excluded the father-in-law of the deceased while the other witnesses were testifying, because he was an important witness, and afterwards testified and agreed in several material points with his son's testimony, who was but fifteen years old and the only eye witness to the homicide. (*Walker v. Commonwealth*, 8 Bush, 89-96.)

We do not mean to intimate that any untruth has been testified to by either of these witnesses, but the policy of the law in requiring the separation of the witnesses on the motion of either party is based upon sound reason and justice. And we know of no exception to the rule of excluding witnesses which allows a prosecutor and a witness in the same person to sit by and listen to the details of a trial and then testify himself about the same or connected matters. He, of all others, except the willfully corrupt, is most obnoxious to the rule, for he may have his feelings enlisted or his revenge ranking in his bosom.

The appellant alleged in his affidavit that the boy who was present at the homicide had testified that the appellant shot the deceased once with a rifle gun, and he expected the same evidence would be given on the trial, and thereupon moved the court to have the body of the deceased exhumed and the bullets extracted, avowing that they would all prove to be pistol balls, and that Banks had done the whole of the shooting.

He stated that he had nothing to pay the expenses of the exhumation with, and no friends or relations who were able and willing to do so for him. The court ordered the coroner to exhume the body and cause the examination to be made on the condition that the appellant should first pay the expenses thereof. This he was unable to do, or to have done, and of this action of the court he complains. There is no law requiring the court, at the instance of an accused person, to have dead bodies taken up and examined at the expense of the State or county for the purpose of furnishing him with evidence in

his defense, nor could it compel the officers or others to perform such service without compensation. As the court exercised all the power it had in his behalf the appellant has no legal ground for complaint.

The last assignment of error to be noticed is to instructions. The jury was told that "malice is implied by law from any deliberate, cruel act committed by one person against another, however suddenly done."

This instruction, with immaterial verbal differences, in one form or another, has been over and over denounced by the court as taking from the jury a question of fact which peculiarly belongs to its province. (*Farris v. Commonwealth*, 14 Bush, —; *Trimble v. Commonwealth*, 78 Ky., —; *Buckner v. Commonwealth*, 14 Bush, —.)

An act deliberately and cruelly committed is a fact from which the jury may infer malice, its force depending, however, upon the attendant facts and circumstances of each case. In some cases it would convince the mind of a reasonable man that the perpetrator of it was actuated by malice. In other cases it might be extenuated, excused, or even justified, by explanatory evidence.

While this court has intimated that so instructing the jury was not a reversible error, yet a correct exposition and rigid execution of the criminal law, in accordance with the genius of our republican institutions, demand that such an instruction as above quoted should be no longer tolerated.

Wherefore, the judgment is reversed and cause remanded, with directions to grant appellant a new trial and for further proper proceedings.

R. H. Weddington for appellant.

P. W. Hardin for appellee.

EMBRY v. COMMONWEALTH.

(Filed September 10, 1881.)

The words intimidating, alarming and disturbing, as used in "An act to amend chapter 28 of the Revised Statutes," approved April 11, 1873, known as the Kuklux Act; imply the use of physical force or menace, and involve a breach of the peace.

Threats to prosecute for selling whisky without license from U. S. government is not such an "intimidating, alarming and disturbing" as is punishable under said act.

Appeal from Ohio Circuit Court.

Opinion of the court by Chief Justice Lewis.

The appellant and Louis Hix were indicted under the second section of the act, entitled "An act to amend chapter 28 of the Revised Statutes, title 'Crimes and Punishments,' " approved April 11, 1878, for the offense of unlawfully confederating together for the purpose of intimidating, alarming and disturbing another.

Appellant having been convicted and adjudged to be confined in the penitentiary eleven months, appeals to this court for reversal of the judgment.

The facts stated in the indictment as constituting the offense are, that "said Embry and Hix, in the county of Ohio, on the — day of January, 1878, and before the finding of the indictment, did wilfully and unlawfully confederate and band themselves together for the purpose of, and did then and there willfully and unlawfully intimidate, alarm and disturb Jordan Pearson, by then and there threatening to have said Pearson prosecuted in the United States Court for selling whisky in said county without license; and by his confederating as aforesaid, and threatening as aforesaid, greatly intimidated, alarmed and disturbed said Pearson, and by so doing as aforesaid demanded of and against his will forced said Pearson to pay them \$31 in money in consideration that they would not inform on or testify against him concerning said matter of selling whisky as aforesaid," etc.

The second section of the act is as follows: "If any two or more persons shall confederate or band themselves together for the purpose of intimidating, alarming and disturbing any person or persons, or to do any felonious act, they, or either, shall, on conviction thereof, be confined in the penitentiary not less than six nor more than twelve months, or, in the discretion of the jury, fined not less than \$100 nor more than \$500, and imprisoned in the county jail not less than three nor more than six months."

Whether the statute be considered with reference to the reason for its enactment, and the mischief intended thereby to be provided against, or construed according to either the common and approved usages of language or the technical meaning of the words used, it is clear that the facts stated in the indictment do not constitute the offense described in the second section.

The mischief the legislature intended by the statute to provide a remedy against was the confederating and banding together of disorderly and evil-disposed persons for the purpose of unlawfully, and by the use of force, or threats of force and violence, overawing and injuring the persons and property of obnoxious or defenseless individuals, to the disturbance of public tranquility and order.

Intimidating, alarming and disturbing, in the sense the words are obviously used by the legislature, as well as according to their legal signification, imply the use of physical force or menace, and involve a breach of the peace.

The statement in the indictment is that appellant and Hix confederated and banded themselves together for the purpose of intimidating, alarming and disturbing Pearson, not by violence to his person or property or threats of violence, but by threatening to have him prosecuted in the United States Court for selling whisky without license.

If Pearson was guilty of violating the revenue laws of the United States, which is not negatived and may be reasonably inferred, it was not unlawful for appellant and Hix to have him prosecuted for the offense, or to confederate for that purpose.

But whether he was guilty or not the particular circumstances stated in the indictment do not constitute any offense in the meaning of the second section of the statute.

It is alleged in the indictment that Pearson was, by a threat of being prosecuted, forced against his will to pay to them \$31 in consideration that appellant and Hix would not inform on or testify against him. But the offense charged being for confederating for the purpose of intimidating, alarming and disturbing, and not for any actual injury to person or property, it is immaterial why the money was paid, or whether it was paid at all or not.

The circuit court erred in overruling the demurrer to the indictment and the motion in arrest of judgment.

Wherefore, the judgment is reversed and cause remanded, with directions to sustain the demurrer and dismiss the indictment.

Walker & Helm for appellant.

P. W. Hardin for appellee.

L., C. & L. RY. CO. v. GOETZ'S ADM'X.

(Filed September 13, 1881.)

1. Negligence is a question of fact for the jury—An instruction in which the court assumed certain facts which tended to show negligence was properly rejected.

2. The failure to give such signal or warning as will be sufficient to apprise those at or near a railroad crossing of the approach of the train must be regarded as negligence.

3. Presumption as to negligence—Where there is an absence of evidence as to the care exercised by a party injured by a train of cars at such railroad crossing it will not be presumed that the party injured failed to use the proper degree of care, or entered upon the track knowing of the train's approach.

4. The same degree of care is required of both those in charge of the train and those traveling over a public highway crossing its track; and

5. A greater degree of care is required of both parties where the view of such crossing is obstructed, and in proportion to the amount of travel on the highway.

As to what constituted negligence in this case see opinion.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Pryor.

The appellee's intestate, Michael Goetz, in attempting to cross the track of the Louisville, Cincinnati & Lexington Short-Line Railroad at the intersection of that road with the Covington and Independence turnpike, was run over and instantly killed by a train of cars owned and operated by the appellant. The widow of the deceased, as his administratrix, instituted the present action under the statute, alleging that her husband lost his life by reason of the negligence, etc., of the employes of the appellant in running its trains, and recovered a judgment for \$4,500 in damages, of which the appellant is complaining.

The testimony conduces to show that the traveler on the turnpike on his way from Covington to Independence, the direction in which the deceased was going, is prevented from seeing the line of railway or its trains as he approaches this crossing, by reason of an elevation or high ridge of ground that intervenes until he reaches a point at or near the crossing of the railroad track. The intestate, a farmer about forty-three years of age, while driving his team from Covington to his home in the county of Kenton, about seven o'clock in the evening, while crossing the railway at its intersection with the turnpike, was run over by the cars and found dead a few minutes afterwards, a short distance from the crossing. No one was with the deceased at the time of the accident, and the recovery in the court below was based principally on the statements of those in charge of the train at the time of the accident, and the ground of recovery is "that the appellant or its employes failed to give the deceased sufficient warning of the approach of the train, and to use the necessary precaution to apprise those traveling on the turnpike of the danger in attempting to cross at this particular point in the road."

It further appears that the deceased was a careful, thrifty farmer, and familiar with the territory at and near the intersection of the two roads, as well as the time the train usually passed the point at which he was killed. The train inflicting the injury was on its way from Louisville to Cincinnati, and a minute or two behind its regular time at this crossing. It was running at a speed of thirty miles an hour, and, from the statements made by the engineer in charge of the train, it is doubtful whether the deceased could have avoided the injury by the exercise of the utmost vigilance on his part unless he had kept off the track of the railroad until the train had passed. This witness stated, on being interrogated by counsel for the appellant (the company), that when he blew the long whistle, which is the common signal for the approach of the train, he was only sixty or seventy yards from the crossing, or perhaps further; and being again interrogated, stated the train was three hundred yards distant from the intersection when the long whistle was sounded, and the bell was also rung by the

fireman, and in this statement he is corroborated by the latter; that he was in forty feet of the intersection when he saw the horses upon the track, and then reversed the engine, using every effort within his power to check the progress of the train. The train at the time was on a down grade, with its speed, as the engineer states, increasing as it approached the turnpike, and it is manifest that no human effort could have prevented the misfortune after the horses had gotten on the track of the railroad, and even in the act of crossing it. Numerous instructions were given at the conclusion of the testimony, and several instructions asked for by the appellant were refused. We deem it necessary to consider only the principal instruction asked for by the appellant, as it is clear if his instruction embodies the law of the case the verdict should have been for the defendant. The refusal or giving of other instructions did not prejudice the substantial rights of the parties, and, besides, the special finding had on motion of the appellant shows that the jury passed upon the real issue, and could not have been misled by any instruction given or refused except the instruction we propose to consider. That instruction reads:

"For the defendant the jury are told that the plaintiff's testimony shows that the deceased was familiarly acquainted with the crossing, and it was his duty to have avoided being run against by defendant's train by keeping off the track at crossing time, and if he failed so to avoid the train and placed himself so close to the train as to put it out of the power of the defendant's employes to avoid injuring him, then the law is for the defendant."

This instruction should have been refused for several reasons. In the first place it was the province of the jury to pass upon the facts evidencing the neglect of either party, and the court had no right to assume that the deceased was acquainted with the road and its surroundings, or with the time that trains passed. Whether such facts had been established was with the jury and not the court, and particularly when the jury were told that the existence of such facts precluded a recovery. The court, if the testimony showed negligence on the part of the deceased and not on the part of the company, might have instructed the jury to find for the defendant; but when the

jury was left to determine the issue, the court should not have assumed that certain facts had been established conducing either to defeat or sustain the recovery. Again, the instruction requires that all the care and caution should have been exercised by the deceased and none by the company, for if this instruction is the law the presence of the deceased on the road is such evidence of negligence on his part as defeats the action. If the right to the use of this crossing is not mutual, or the company has the exclusive right to its use, then the instruction would not be so objectionable. It is no response to a claim for damages in a case like this to say that if the deceased had remained off the crossing until the train passed he would have escaped injury, and his being on the crossing at the time the train passed is evidence of his neglect. The right of the appellant to run its trains on the road at this point, and at any reasonable rate of speed, is unquestioned, but at the same time it is incumbent on the company and its employes, or those in charge of the train, to exercise such care and precaution as to prevent injuring those traveling on public highways at points crossing the track of its railway. It is not necessary or required of those in charge of the train to stop in order to see whether or not persons are approaching the crossing, but, on the contrary, it has the right to pass, and those on the highway seeing or knowing of its approach, or when the proper and necessary signals have been given so as to notify them of the train's approach, they must yield the right of passage to the train. The great speed of the train, the necessities and safety of those on it, as well as the safety of the traveler on the ordinary highway, all require that this preference should be given; that it is the duty of those in charge of the train to give due and proper warning of its approach, that those crossing its track may know and avoid the danger; and when passing great thoroughfares thronged with travel the speed of the train should be checked or other means secured to insure the safety of those on the highway; and a failure to give such warning or to use such precaution must be regarded as neglect (*Paducah & Memphis Railroad Co. v. Hoehl*, 12 Bush, 45; *Claxton's Adm'r v. Lexington & Big Sandy Railroad*, 18 Bush,

642; Louisville & Nashville Railroad Co. v. Commonwealth, 398.) While those on the highway when about crossing a railroad track must exercise proper diligence and care with reference to their own safety, where there is an absence of evidence as to the care exercised by the party injured, as in this case, it is not to be presumed that the deceased recklessly or carelessly imperiled his own life, or entered upon the track of the road knowing of the train's approach. If the presumption of negligence arises from the mere fact that the deceased was killed on the track, at a place where he had no right to be, it must necessarily defeat a recovery in all such cases unless it should appear that those in charge of the train, after discovering the dangerous condition of the party injured, could, by the exercise of ordinary care, have avoided the impending injury.

This doctrine might apply if the party injured was on the track of the railroad when he had no right to be, but has no application to a case like this.

Counsel for the appellant have called the attention of the court to several cases in support of the instruction asked, and while they conduce to sustain the position taken, they can not be reconciled with the adjudications of this court on similar cases. The principal case is that of the Pennsylvania R. R. Co. v. Neal, 73 Penn. State Reports, in which it is said: "A prudent and careful man will always stop and listen for the appearance of the train when about to cross its track; indeed the duty of stopping is more manifest when an approaching train can not be seen or heard than when it can. If the view of the track is unobstructed, and no train is near or heard approaching, it might, perhaps, be asked why stop? In such a case there is no danger of collision—none takes place, and the sooner the traveler is across the track the better. But the fact of collision shows the necessity there was of stopping, and, therefore, in case of collision the rule must be an unbending one." The fact that the traveler failed to stop and listen before entering upon the track is made negligence per se by the case cited and the case before us, because there is no evidence that he did stop and listen, we are asked to presume that he did not stop, and, therefore, his personal representative can not recover (*Hanover R. R. Co. v. Coyle*, 5 P. F. Smith, 396).

That a prudent man should use at least ordinary precautions to know whether a train is or not approaching is evident, but if he fails to do so, or if there is no proof as to what care he did take before going upon the track, does this dispense with the necessity of those in charge of the train from giving the proper warning or using the proper care to prevent collision at such points on the road? We think not. It is evident that if the party injured had not gone on the track no collision would have taken place, but it by no means follows because he was killed at the crossing, a point where he had the right to travel, that he is guilty of such negligence as excuses the company for its neglect. That the party injured may be guilty of such contributory negligence as to prevent a recovery is conceded, but in this case both parties had the right to the use of this part of the road for passing. This right was mutual, with the duty on the part of the deceased to exercise such caution as an ordinarily prudent man would under the circumstances; and the exemption of the appellant from all liability in the event it gave the proper warning of the approach of its trains and the killing or injury was unavoidable.

The same degree of care is required of both those in charge of the train and those traveling over a public highway crossing its track. The case of the Continental Improvement Co. v. Stead, 5 Otto, 163, embodies the law of this case. "Both parties," says the court in that case, "must exercise such care as men of common prudence and intelligence would ordinarily use under such circumstances. Where the view is obstructed so that parties crossing the railroad could not see an approaching train, the exercise of greater care and caution was required on both sides. Those in charge of the train should approach the crossing at a less rate of speed, and use increased diligence to give warning of its approach."

The question of negligence was probably left to the jury, and by a special finding, made at the instance of the defendant, the jury said: "The negligence consisted in the running of the train at too great a speed on its approach to the turnpike, and in not giving the proper precaution, and in not having a flag-man at the crossing." Under this special finding the only

question really to be considered is, did the evidence authorize the conclusion reached by the jury? The turnpike on which the accident took place is one of the most important highways in that portion of the State, leading directly from the city of Covington; it is constantly thronged by travelers, and a greater degree of care and caution should be exercised than at ordinary crossings. The usual whistle, if made in reasonable time so as to give the warning, would ordinarily be sufficient; but the point at which the accident occurred in this case is within six miles of the city of Covington, and a stream of travel over the turnpike that is common in such approaches to the larger cities of the State.

The train in this instance crossed the turnpike on a descending grade with an increased rate of speed, running thirty miles or more an hour, with no other signal or warning than a whistle within seventy yards, or, at best, within three hundred yards of the crossing, to warn those traveling on the turnpike of its approach. This is itself culpable negligence, and rendered any approach to the railroad on such a thoroughfare dangerous to all passing over it. Running a train at such speed over the streets of a small village would be attended with little more danger. It being the duty of those on the highway to look and listen for the approach of the train, it is equally the duty of those in charge of the train to give sufficient warning of its coming, and on such a thoroughfare as this turnpike is shown to be to lessen the momentum of the train, as well as to provide other means to insure the safety of those traveling the byway as well as those on board the train. As said in the case cited, "if an unslackened speed is desirable, watchmen should be stationed at the crossing." The traveler is required to stop so that the trains may pass, but this is conditional upon the train giving due and timely warning of its approach. "The duty of the wagon to yield precedence is based upon this condition." The blowing of the whistle three hundred yards from such a crossing, and running with the speed of the train in this case, is not a sufficient warning, and the facts authorize both the special and general finding.

The judgment is affirmed.

Barnett & Noble and M. J. Dudley for appellant.

W. E. Arthur for appellee.

AUDITOR v. MAJOR.

(Filed September 20, 1881.)

It was not the duty of the public printer under a resolution of the legislature, approved February 21, 1840, to republish, without the order of the auditor, the report of the commissioner of the insurance bureau, made to the auditor in compliance with "An act to establish an insurance bureau," approved March 10, 1870, after 1,000 copies thereof had been published and paid for out of the fees and allowances received by the insurance bureau.

The resolution of February 21, 1840, was repealed by the act of March 20, 1876, in relation to the public printer.

For construction of facts referred to see opinion.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Hargis.

The appellee, Major, brought this action for a mandamus to compel the auditor of public accounts to issue his warrant upon the State treasurer for the sum of \$1,527.14 in payment of a demand against the State for public printing.

The facts alleged in the petition are in substance that the legislature, by a resolution passed in February, 1840, provided that the public printer shall publish all reports made to both houses of the same matter in a separate volume; that "An act to establish an insurance bureau," approved March 10, 1870, makes it the duty of the insurance commissioner to make annually a report to the auditor of the condition of the insurance companies doing business in the State, with suggestions, etc., and that one thousand copies of such reports shall be published by the State, subject to the order of the auditor, and at the expense of the insurance bureau, and the auditor shall place the same before the legislature with an account of the receipts and expenditures of the bureau; that the insurance commissioner made his report to the auditor as provided in the act of 10th March, 1870, and the auditor placed the same before the legislature; that it became the duty of the public printer to publish said report so placed before the legislature, and he did publish six hundred and twenty-four copies thereof for which the Commonwealth of Kentucky is indebted to him in the sum of \$1,527.14, and that he had demanded of the auditor a warrant therefor, but he refused to issue it.

It was agreed that one thousand copies of the report of the commissioner to the auditor had been published by the State, subject to the order of the auditor and at the expense of insurance bureau.

The auditor demurred to the petition; it was overruled, to which he excepted, and failing to plead further a judgment was rendered awarding the mandamus.

The vital question on this appeal is, was it the duty of the public printer, without the order of the auditor, to republish the report of the commissioner to the latter, who placed the same before the legislature after having one thousand copies of it published.

The resolution of 1840 provided that the "public printer shall thereafter in executing the public printing publish all reports, made to both houses of the same matter, in a separate volume and dispense with the appendix to each of the volumes of journals as now published; and that one copy be sent to each individual entitled to copies of the journals."

The proper construction of this resolution does not authorize the inference that the public printer shall publish all reports of the same matter made to both houses.

It simply meant that in executing the public printing which he might be ordered to do he should publish all reports in a separate volume, and that one copy should be sent to each individual entitled to copies of the journals whose appendixes were thereafter to be dispensed with, provided such reports were of the same matter to both houses.

It had reference alone to the form in which that class of reports should be published, and required that they should be published in separate volumes.

The proceedings of nearly every session of the legislature since 1840 contain resolutions or acts regulating the number and character of reports and public documents published, which shows that the legislature has not, and does not, construe the resolution of 1840 as providing for the publication of all reports to both or either house.

Appellee's construction of that resolution would require the publication of 640 copies of each report made to both houses.

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without making any distinction between important and unimportant reports.

We do not think this unreasonable result should follow the construction of the resolution of 1840, and we are of the opinion that it does not authorize the public printer to publish any report unless he is especially directed to do so by the legislature.

And as to the printing for the insurance bureau, the act of March 10, 1870, and the resolution of March 12, 1878, expressly provide that it shall be paid for out of the fees and allowances received by the commissioner under the law creating the bureau.

The purpose of the legislature seems to have been to make the bureau self-sustaining, and either a legally authorized order of the auditor or the act creating it, or some amendment thereto, or law passed since its creation must be shown authorizing the public printer to make publications relative thereto before he can lawfully assert a claim therefor against the State.

The act of March 20, 1876, re-enacted the law requiring the election of a public printer and so much of chapter 90 of the General Statutes as was deemed applicable to his office and duties.

By section 13, which was restored, it is provided that "If any report, bill or document is ordered to be printed, and no number of copies is designated, there shall be but two hundred printed at public expense."

This section reserved to the legislature the power of ordering what reports should be published, and provided also, if by oversight or otherwise, it should fail to fix the number, that only two hundred should be printed.

And it repeals by necessary implication the resolution of February, 1840, whatever may be its correct construction.

Taken in connection with the afore-mentioned acts of the legislature, we do not doubt this is the legal effect of said section.

Wherefore, the judgment is reversed and cause remanded, with directions to sustain the demurrer and for proper proceedings.

P. W. Hardin and T. E. Moss for appellant.

A. Duvall for appellee.

COMMONWEALTH v. MILLER.

(Filed September 17, 1881.)

Indictment must state that the offense charged was committed before the time of finding the indictment, but it is not necessary that the statement be made in express terms if the words used clearly imply such to have been the fact.

Appeal from Calloway.

Opinion of the court by Chief Justice Lewis, reversing.

The only question in this case is whether the demurrer to the indictment was properly sustained.

The defendant is charged with having committed the offense upon the same day that the indictment was presented to the court by the foreman of the grand jury, and filed on the 22d of November, 1880.

The commission of the offense is charged as follows:

The said J. A. Miller did, on the 24th day of November, 1880, in the county aforesaid, carry concealed on and about his person a pistol, the same being a deadly weapon, etc.

Section 129, Criminal Code, is as follows: "The statement in the indictment as to the time at which the offense was committed is not material further than as a statement that it was committed before the time of finding the indictment unless the time be a material ingredient in the offense."

Whatever may have been the rule before the adoption of the Criminal Code, it is now no objection to an indictment that the time of committing an offense is laid on the same day the indictment is presented to the court and filed, provided the offense is alleged to have been committed before the time of finding the indictment. Although it would have been better and more accurate to have stated in express terms that the offense was committed before the finding of the indictment, the words used clearly imply such to have been the fact.

The allegation that the defendant did, on the 24th of November, 1880, carry concealed a deadly weapon, necessarily means that at the time the indictment was found the offense had already been committed.

The court below erred in sustaining the demurrer to the indictment.

Wherefore, the judgment is reversed and cause remanded,

with directions to overrule the demurrer and for further proceedings consistent with this opinion.

C. H. Thomas and P. W. Hardin for appellant.

MINTON v. COMMONWEALTH.

(Filed June 25, 1881.)

1. Law of self-defense—A man in imminent danger of great bodily injury, or receiving bodily injury at the hands of another, unless caused by his own wrongful act, has the right to use such force, even to the taking of life, as may be reasonably necessary to prevent the unlawful infliction of such injuries upon himself.

2. A person recklessly using or discharging a pistol, without intending to injure anyone thereby, but accidentally killing another, under such a state of facts as exists in this case is guilty of manslaughter, but not of murder.

Appeal from Breckinridge Circuit Court.

Opinion of the court by Judge Hargis.

The appellant, Minton, as the evidence tends to show, was at his voting precinct, partially intoxicated, on the day of election for representative to the legislature, and that Willis F. Frank, who was a candidate for that office, and the favorite of Minton, was also there, when one Speak rode up in haste huzzaing for Frank's opponent. He alighted from his horse, began dancing and continuing to shout for his candidate. This occurred several times, when Minton struck him once or twice in the back of the head or neck, and Speak turned and seized him by the throat, backing him to a corner of the fence, and choked him until he was black in the face. The father of Minton attempted to separate them, and while he was so engaged, or just afterwards, the appellant, Minton, drew his pistol and killed said Willis F. Frank. Immediately after the shot the crowd which had pressed close to H. Speak and Minton during their struggle, and manifesting favor to the former, loudly exclaimed "kill him," and pursued Minton with rocks and clubs.

He was indicted, tried and convicted of the offense of manslaughter, and sentenced to the penitentiary for twenty-one years, and he prosecutes this appeal, seeking a reversal mainly on the ground that the court erroneously instructed the jury.

This is the only question necessary to be considered.

The fifth instruction is as follows:

"But if defendant assaulted Speak and Speak repelled the assault with more violence and more force than was necessary to defend and protect himself from the force offered by defendant, and was inflicting, or about to inflict, great bodily harm upon defendant, such as would endanger his life, or if defendant believed, and had reasonable grounds to believe, that Speak was then about to inflict great bodily harm upon him, such as would endanger his life, and he had no other apparently safe means of escaping therefrom, then he had the right to use such force and such means, and no more, as was necessary to save himself from such impending danger; and if Frank was killed by the use of such means the defendant is excusable, and should be acquitted."

By this instruction the jury were in effect told that the defendant had no right to shoot in his self-defense unless the bodily harm which was being, or about to be, inflicted upon him endangered his life. This is not the law of self-defense. Whenever a man is in imminent danger of great bodily harm, or it is being inflicted on him, whether it endangers his life or not, he has the right to use such force as appears to him in the exercise of a reasonable judgment to be necessary to repel it unless by his own wrongful act he makes the harm or danger to himself necessary or excusable in the person who is inflicting, or about to inflict, it upon him.

While putting out an eye, cutting off an ear, slitting the nose, bruising the body, or choking a man with great violence, may not endanger his life, still he has the right to use such force, even to the taking of life, as may be reasonably necessary to prevent the unlawful infliction of such injuries upon him.

The court erred in limiting the degree of bodily harm to such as endangered the defendant's life; and to that extent only the instruction quoted was erroneous.

We quote the sixth instruction, which is:

"If the jury shall believe from the evidence that at the time the pistol was fired by the defendant the fight between defendant and Speak had ended, and that defendant had no intention

of using it in the fight, or of renewing the fight with Speak, but was holding it merely as a weapon of defense, and it was discharged by accident, and not designedly or recklessly on the part of defendant, and by such discharge Frank was killed, the defendant is excusable and should be acquitted."

Instruction No. 3, taken in connection with the one quoted, excludes the defendant from the benefit of the law applicable to the reckless use or discharge of the pistol without intending to injure anyone thereby. For if, after the conflict had ended between defendant and Speak, the jury should believe that the pistol was accidentally fired, resulting from the recklessly careless use of it by the defendant, in view of the fact of this case he was guilty of manslaughter, but not of murder, and the jury should have been so instructed (*Chrystal v. Commonwealth*, 9 Bush, 671). There was no instruction given presenting this view of the case to the jury. We see no error in any of the instructions given.

Wherefore, the judgment is reversed and the cause remanded for a new trial.

Mercer & Kincheloe for appellant.

P. W. Hardin for appellee.

GRAY'S EX'OR, &c. v. LEWIS, &c.

(Filed September 17, 1881.)

1. Personal representative of nonresident, whose estate in this State is insufficient to pay debts of residents of this State, must distribute the estate without preference pro rata among the resident creditors and such creditors as reside elsewhere as prove and demand their debts within two years after the appointment of such personal representative. (Section 8, article 2, chapter 39, General Statutes.)

2. But while assets remain in the hands of such personal representative undisposed of, creditors residing elsewhere, as well as in this State, may, after expiration of the two years, prove and demand their debts and participate in the distribution of such assets.

Appeal from Hickman Circuit Court.

Opinion of the court by Chief Justice Lewis.

The facts in this case, by agreement stated in the judgment rendered, are as follows:

In 1875 Ben E. Gray, a resident of the State of Alabama, died then testate, and May 5, 1875, John P. Gray qualified in Hickman county, Kentucky, as his executor.

The executor has made no settlement with the county court nor distributees removed from the State, or paid to creditors any part of the estate. In fact the personal assets, if any at all, are inconsiderable. But on the — day of May, 1877, he filed in the Hickman Court of Common Pleas a petition in equity for a settlement of the estate as provided in chapter 8, title 10, Civil Code.

The appellees, who are creditors and residents of Alabama, proved and demanded their debts here within two years from the date the executor qualified. They were afterwards filed with the commissioner of the common pleas court, and by him allowed and reported to court as valid demands against the estate. But not being verified in the manner required by law exceptions to them were sustained. Subsequently, though not within two years from the date of qualification by the executor, they were properly verified and again allowed and reported to court by the commissioners.

The creditors who are residents of this State contested the right of the Alabama creditors to payment of any part of their debts out of the estate here. But the court below rendered judgment for a sale of the real property of decedent, and the payment of the balance left of the proceeds thereof, after satisfying certain preferred claims, to the general creditors without preference pro rata. But the amount which the Alabama creditors have received, or can receive, from the assets and estates in Alabama are to be deducted from their respective debts, the several amounts to be so deducted being fixed by the judgment.

From that judgment the executor, the Kentucky creditors, and Lucy Kindall and Nannie Perkins, to whom the land adjudged to be sold was devised, have appealed to this court, and assign the following errors:

"1st. The court erred in allowing the Alabama creditors to pro rate the proceeds of the land sold with the Kentucky creditors, and decreeing a sale of land to pay Alabama claims.

'2d. The court erred in allowing the Alabama claims, when the same had not been presented to the executor within two years, properly proven, against said estate.'

The two errors complained of are virtually the same, and involve practically but one question.

In support of their views appellants rely upon section 8, article 2, chapter 89, General Statutes, which is as follows: If such person's (nonresident) estate found in this Commonwealth shall be insufficient to pay the creditors here, it shall be disposed of without preference pro rata among the creditors here, and such of those elsewhere as prove and demand their debts here within two years after the appointment of a personal representative. But there must be deducted from such foreign debts the amounts received, or which can be received, by the foreign creditor from assets and estate not in this Commonwealth; and if the foreign assets and estate be sufficient to pay all the foreign debts, then no part of them shall be allowed or paid here."

The section quoted does not apply when an action in equity is brought to settle insolvent estates and sell real property to pay debts. Neither is the construction put upon it by appellant's counsel the proper one.

If the personal representative has not assets in his hands with which to pay debts against the estate there is no necessity for creditors to present their demands to him for payment. After the action to settle the estate is commenced it is in the sound discretion of the chancellor to prescribe the time within which creditors may present their demands, proved and verified according to law, and the question of their validity is subject to his decision.

There is nothing in this case showing an abuse of discretion in permitting the debts of the Alabama creditors to be proved and filed with the commissioners; nor does it appear they have received, or can receive, from the assets and estate in Alabama any greater sums than they are charged with in the judgment. The justice of their demands is not denied.

The object of the legislature was not by that section to discriminate against nonresident creditors, but to facilitate prompt

settlement and disposal of estate of persons not residents at the time of their death that may be in the hands of personal representatives in this State.

The limit of two years mentioned is the period within which personal representatives are required to dispose of such estates, and may do so without incurring liability to either Kentucky or foreign creditors who have failed to prove and demand their debts of him.

But while assets remain in his hands undisposed of creditors elsewhere, as well as here, may, even after the expiration of two years from the time he qualifies, prove and demand their debts. So even if the section referred to applied to this case the Alabama creditors would not be precluded.

Wherefore, the judgment is affirmed.

Bullock & Bullock for appellants.

Moss & Ray and N. P. Moss for appellees.

HARRIS, &c. v. ANDERSON, &c.

(Filed September 17, 1881.)

Present and contingent interests in land may be sold for reinvestment in proceedings under sections 489, 491 of the Code of 1877, so as to pass a good title to the purchaser, all parties interested, in being, being made parties to the proceedings.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Pryor, affirming.

James Blythe died in the county of Madison, leaving a last will and two daughters surviving, Mrs. Anderson and Mrs. Sims. He devised to his two daughters certain lands, and to his daughter, Mrs. Anderson, the tract of land sold in this case. The devise is to his daughter for life, with remainder to her children, with the further provision that if either of his daughters should die without children the survivor or her lineal descendants should take the estate. Mrs. Anderson has one child, and the father, J. C. Anderson, is his statutory guardian. The guardian filed this petition asking a sale of the tract of land devised that the proceeds might be reinvested in other lands, alleging that it would redound to the interest of all the parties in interest, and that the land purchased with

the proceeds might be held on the same conditions and limitations as placed on the right and title of the land sought to be sold by the will of James Blythe.

Mrs. Sims and her husband are living and they have several children, all of whom are made defendants to the action and served with process. The adult defendants make no objections to the sale and reinvestment, and the infants are represented by a guardian ad litem. It seems to be the interest of all that the land should be sold and the reinvestment made. The sale was ordered by the chancellor under sections 489 and 491 of the Civil Code. A bond has been executed by the guardian and approved by the court securing the rights of the infant, and the steps required to be taken by the provision of the Code complied with. That these provisions authorize the sale is unquestioned, and the chancellor retaining the control of the proceeds for purposes of reinvestment, we perceive no reason why the purchaser should not pay into court the purchase money. The court requires that when the reinvestment is made the parties shall hold the title as under the will of the testator. Mrs. Anderson, who was made a party plaintiff by an amended petition, was made a defendant, and thus cured any defect in the proceeding so far as she was interested; in fact her husband and herself could unite in conveying her interest. As there is no valid objection made to the title, and none existing in the record, the exceptions by the purchaser to the sale and proceedings under it were properly overruled. He should be required to accept the title and comply with the terms of sale. Judgment affirmed.

John Bennett for appellant.

J. W. Caperton for appellee.

JOHNSON v. UTLEY.

(Filed October 28, 1880.)

The forfeiture of all the interest, by party loaning money at a greater rate of interest than that provided by the General Statutes and subsequent amendments, was in the nature of a penalty, and when the section authorizing the forfeiture was repealed by the act of March 2, 1878, there was nothing to prevent the obligee from recovering his debt with legal interest.

"\$302.40.

October 24, 1877.

"One day after date I promise to pay to the order of J. W. Johnson three hundred and two dollars, bearing ten per cent. interest from date until paid, value received.

(Signed) "ALLEN UTLEY."

On a petition on the above note, and another note of like import for \$854.57, the obligee filed his petition ordinary in the Franklin Circuit Court, September 30, 1878, and prayed for judgment for the amount of each debt, "with ten per cent. interest thereon since the 24th day of October, 1878, and costs and for all other proper relief."

On the final hearing the circuit court adjudged that "the plaintiff by intentionally charging defendant a greater rate of interest than that allowed by law, as evidenced by the notes sued on, forfeited all interest accruing after the maturity of, and before the judgment upon, said notes."

The plaintiff appealed.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Pryor.

The forfeiture by the party loaning at a greater rate of interest than that provided by the General Statutes and the subsequent amendments was in the nature of a penalty, and when the section authorizing the forfeiture was repealed by the act of March 2, 1878, there was nothing to prevent the obligee from recovering his debt with legal interest.

The legal rate of interest by the act of March 2, 1878, is 6 per cent., and the appellant was entitled to recover his debt with that rate of interest. For this reason alone the judgment is reversed and cause remanded, with directions to enter judgment accordingly.

John L. Scott for appellant.

Ira Julian for appellee.

BROWN v. GEIGER.

(Filed September 22, 1881—Not to be reported.)

1. Mistake can not furnish ground of relief to the party by whose fault it occurs.

Nor can mistake be successfully relied on for affirmative relief against a written contract by a party who admits he was not mistaken, but knew the facts at the time he made the contract, which he relies on to reform it. (McKee v. Hoover, 1 Mon., 32.)

2. If a mistake be known to one party, and it operates as surprise or fraud upon the other party, who is ignorant of it, the latter, but not the former,

can obtain relief in equity upon the ground of mistake. (Story's Eq., section 147.)

Appeal from Boyd Criminal Court.

Opinion of the court by Judge Hargis.

Without regard to the extraneous evidence, the within agreement of 25th of November, 1869, between the appellant and appellee, although it may be construed as an exchange of lands, would not prevent the appellee from recovering on the ground of mistake the value of the excess in the pasture field exchanged or sold to appellant, but for the fact the appellee admits in his deposition that at the time of the trade he knew the land he was about to let appellant have "would overrun the five acres."

He also testified he did not remember that he stated his knowledge of the fact to appellant, because "both tracts had to be surveyed and if his overrun it would go as a credit on the \$1,000 due Mr. Brown on our contract."

Had he disclosed his knowledge to appellant that the "pasture field" contained more than five acres, the latter might not have been willing to pay \$160 per acre for any material excess over that quantity, or exchange his lands for so many acres as 8 1-10 at \$160 per acre.

And it was the duty of appellee not only to disclose his knowledge of the excess, but, if he wished to bind appellant to pay him therefor, he should have had it so stipulated in the written contract.

Only the deficit was provided for in the contract and appellant had the right, from this stipulation, to believe that appellee thought there would be no excess, and was not concealing the fact that "he knew at the time" his land would overrun five acres.

Mistake can not furnish any ground of relief to the party by whose fault it occurs. Nor can mistake be successfully relied on for affirmative relief against a written contract by a party who admits he was not mistaken, but knew of the facts at the time he made the contract, which he relies on to reform it. (McKee v. Hoover, 1 Mon., 32.)

If a mistake be known to one party and it operates as a surprise or fraud upon the other party, who is ignorant of it, the

latter, but not the former, can obtain relief in equity upon the ground of mistake. (Section 147, Story's Eq.*Jur.)

As to the conflict between appellee's land and the forty-two-acre tract of appellant, the latter should not have the benefit of the quantity contained in the interference.

Leaving this out, the difference between ninety acres and the actual quantity in three tracts which appellant sold, or exchanged with appellee, should be credited on the \$600 due from appellee to appellant, and judgment should be rendered in favor of the latter for the remainder.

Whereupon, the judgment is reversed and cause remanded for further proceedings consistent with this opinion.

George N. Brown and A. Duvall for appellant.

W. C. Ireland for appellee.

COMMONWEALTH v. McCRORY.

(Filed September 24, 1881—Not to be reported.)

An indictment under section 2, article 17, chapter 29 of the General Statutes, for the offense of unlawfully shooting at another with intent to kill or wound such person, without inflicting a wound, must state the instrument or weapon with which the alleged offense was committed.

Appeal from Marshall Circuit Court.

Opinion of the court by Chief Justice Lewis.

Appellee was indicted under section 2, article 17, chapter 29, General Statutes, for the offense of unlawfully shooting at another with intent to kill or wound such person without inflicting a wound.

This appeal is from the judgment sustaining a demurrer to the indictment.

The only objection made to the indictment necessary to be noticed is that the instrument or weapon with which the alleged offense was committed is not stated.

The indictment should contain a statement of the act constituting the offense, and should be direct and certain as regards the particular circumstances of the offense charged, if they be necessary to constitute a complete offense.

Generally, but not always, an indictment for a statutory offense is sufficient if it be in the words of the statute as this is. "Whether sufficient or not depends upon the manner of stating the offense in the statute. If every fact necessary to constitute the offense is charged, or necessarily implied by following language of the statute, the indictment in the words of the statute is undoubtedly sufficient; otherwise not." (*Commonwealth v. Stout*, 7 B. M., 242.)

"The facts necessary to constitute the offense must be alleged, and it is not sufficient that the essential facts may be inferred from those which are stated." (*Taylor v. Commonwealth*, 1 Duvall, 161.)

Tested by these rules the indictment is insufficient. The simple charge of shooting at another with intent to kill or wound is merely a conclusion of law. For the act of shooting at another does not necessarily imply the use of a weapon sufficient to kill or wound, because it may be done with an instrument totally insufficient, and under circumstances precluding the idea of a criminal intent.

To make the offense complete the instrument used must be such as corresponds with an intent to kill or wound—in other words, a deadly weapon—and that it was so used must be directly and expressly alleged in the indictment, and not left to be inferred.

If the section under which the indictment was drawn be construed in connection with section 1 of the same article, which is proper, as they are on the same subject, and under the revised statutes made but one section, it is manifest that the gravamen of the offense, in the meaning of the legislature, is shooting at another with intent to kill or wound without inflicting a wound with a gun or other instrument loaded with a ball or other hard substance.

Wherefore, the judgment is affirmed.

P. W. Hardin, C. H. Thomas and W. W. Robertson for appellant.

Gilbert & Reid and William Lindsay for appellee.

DINKLE v. ANDERSON.

(Filed September 22, 1881—Not to be reported.)

Innocent holder of commercial paper was entitled to verdict and judgment in his favor in this case, notwithstanding the defendant's allegation that the paper had been given for corn planters that were worthless and had been assigned to, and accepted by, the plaintiff for the purpose of defrauding the defendant, the proof showing that the plaintiff had acquired the paper in good faith.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Pryor.

If the petition in this case can be regarded as defective the answer cures it.

It is admitted in the answer that the paper, such as is described in the petition, was transferred by Springer & Co. to the plaintiff, and by him accepted for the mere purpose of defrauding the appellee; and in the second paragraph it is stated that the paper sued on was given for certain corn planters that were worthless, and that the appellant obtained the assignment to himself from Springer & Co. with a like fraudulent intent.

The acceptance by the appellee does not appear on the paper copied into the record, and we suppose it is a mere omission by the clerk, as its execution is admitted by the appellee in his answer, and the case went to the jury upon instructions asked by the appellee, based upon the fact of his having accepted the paper. The testimony of the appellee also shows that he indorsed the accepted draft in payment for the machines.

The petition, we think, is fully descriptive of the paper, so as to enable the court to know that it is commercial in its character.

The proof shows that it was discounted by the appellant, and while the burden was on the appellee to show that the appellant knew of the alleged fraud practiced on him by Springer & Co. at the time he discounted or obtained the paper by endorsement, the appellant voluntarily took the burden and has shown by his own testimony and that of others that the assignment was made in good faith for its full value. There is no room for doubt from the proof in the record as to his being an innocent purchaser.

The fact that the appellant was an attorney at law and a director in a bank in the town in which Springer lived will

not authorize the assumption that he was a party to the fraud, or authorize the jury to disregard the direct and positive testimony showing that appellant acted in good faith.

The appellant was entitled to a judgment on the proof, and there was no question for the jury to determine.

Judgment reversed and cause remanded, with directions to award a new trial.

Stanton & Larew for appellant.

Wm. Lindsay for appellee.

PORTER'S ADM'R, &c. v. PORTER, &c.

(Filed September 24, 1881—Not to be reported.)

1. Widow's right to dower is surrendered by the voluntary acceptance of the provisions of her husband's will devising to her all his estate, real and personal. (*Grider v. Eubanks, &c.*, 12 Bush, 510.)

2. Whether the testator was solvent or insolvent, the property devised must be held to have been accepted in lieu of dower.

3. Estate conveyed and devised to widow by her husband is liable for claim against the husband for breach of warranty in a conveyance of land sold by him before, but conveyed after, his marriage.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Pryor.

No objection has been made to the improper joinder of actions. This is a suit by the administratrix on a note and also an action by the widow for the allotment of dower.

It appears that long after the land was sold by the husband, the latter conveyed to his wife, in consideration of love and affection, one hundred acres of land, and by his will devises all of his land to his widow, except ten acres, for life, and all of his personal estate to the widow and children.

The widow is the administratrix with the will annexed, and sues as such. She has never renounced the provisions of the will, and, whether her husband's estate is solvent or insolvent, the property devised must be held to have been accepted in lieu of dower. (*Grider v. Eubanks*, 12 Bush, 512.)

The whole estate has been conveyed and devised to the widow, and she claims in her petition to be the owner and holder of

the note for that reason. Whether the note has been paid or not, the land for which it was executed was conveyed by the husband of the widow with a clause of general warranty, and when that warranty is broken the estate in the hands of the widow conveyed and devised to her would be held liable.

The proof also conduces to show that this land was sold and the purchaser placed in possession before the marriage of the appellant. The conveyance itself recites that the land had been formerly sold and is now conveyed.

It is not necessary to decide whether the answer and petition was or not filed—it was nothing more than a repetition of the original pleadings and presented no new issue.

Judgment affirmed.

Riley, Jolly & Walker for appellants.

W. N. Sweeney for appellees.

COOKSEY, &c. v. CASSADY, &c.

(Filed May 5, 1881.)

1. Depositions of incompetent witnesses, taken prior to the act making persons interested competent, are subject to exceptions for incompetency on the ground of interest at the time they were taken.

2. Oral exceptions to depositions, taken during the progress of the trial, may be reduced to writing and filed at any time before judgment is rendered.

Appeal from Caldwell Circuit Court.

Opinion of the court by Judge Hines.

On the hearing counsel for appellees orally announced that he excepted to certain depositions taken by appellant, on account of interest on the part of the deponents, and after all the depositions had been read and after argument of counsel the court announced from the bench its conclusion in conformity to the judgment appealed from; whereupon counsel for appellees filed written exceptions to the depositions, specifying the grounds of interest, which exceptions were sustained by the court, exceptions taken at the time to the ruling of the court, and thereafter the judgment appealed from was entered of record. At the time the depositions were taken, which was prior to the act making persons interested in the result of an action competent, the persons whose depositions were excepted

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to were not competent witnesses, and the ruling of the court was, therefore, correct; but the complaint is that the verbal exceptions amounted to nothing, and that the written exceptions came too late. Under Myer's Code, which must apply here, because the action was in progress when the Code of 1877 was adopted, exceptions to competency might be filed at any time during the progress of the trial, and the party offering the evidence had the right to require the court to pass upon the exceptions before rendering or entering final judgment on the merits. No request of this kind was made of the court, so far as the record shows, but appellants contented themselves with an exception to the ruling sustaining the exceptions as appears from the judgment. After the final judgment was entered counsel for appellants filed grounds and moved for a new trial, complaining that the written exceptions were not filed until after the argument of counsel, nor until after the court had intimated what its judgment would be, and that he was thereby taken by surprise. As the exceptions might at any time during the trial be filed, and the court has full control over such matters until the judgment is entered, and, as counsel might have required the court to pass upon the exceptions at the time they were filed and before the judgment was entered, as well as he could have done if they had been filed earlier, we see no reason why the court should have granted a new trial on the ground of surprise. Counsel must have known of the right to file the exceptions at any time during the trial, and of his right to have the court pass upon them before entering judgment; but even if it be conceded that the exceptions came too late, because not filed before the depositions were read and argument heard, appellants can not complain because the record does not show that counsel objected to the filing of the exceptions or to their consideration by the court. There is nothing but an exception to the ruling of the court on the exceptions.

Judgment affirmed.

Geo. W. Duvall for appellant.

Sumner Marble & Son for appellee.

CHISHOLM v. GOOCH, &c.

(Filed September 28, 1881.)

1. Claimant of property sold under execution may commence action against obligors in indemnifying bond immediately after its execution.

2. If the sheriff fails to return indemnifying bond, or takes insufficient surety, an action against him is not barred; but—

3. Obligors in indemnifying bond are liable and may be sued by claimant or execution defendant, although the sheriff failed to return the indemnifying bond; and—

In an action on such a bond it is not necessary to allege that it was returned by the sheriff.

Appeal from Lincoln Chancery Court.

Opinion of the court by Chief Justice Lewis.

This is an appeal from a judgment sustaining a general demurrer to the petition in an action upon an indemnifying bond by the claimant of property sold under execution.

The objection to the petition is that it does not show the indemnifying bond was returned by the officer who took it; that in consequence of his failure to return the bond the officer is himself liable to the claimant of the property sold, and, being so, the obligor is not.

The objection of sections 641 and 643 of the Civil Code is to simplify proceedings under executions and prevent multiplicity and circuitry of actions; not to increase the responsibility of officers or lessen the liability of plaintiffs in executions.

Before the adoption of the Civil Code the officer might, in certain cases, require of the plaintiff in execution an indemnifying bond; but was still liable to be sued by the defendant in execution or claimant of property sold, having, in case of recovery against himself to look to the plaintiff in execution for indemnity upon his bond.

Now the claimant or purchaser of any property, for the seizure or sale of which an indemnifying bond has been taken and returned by the officer, shall be barred of any action against the officer levying on the property if the surety in the bond was good when it was taken; and such claimant or purchaser may maintain an action upon the bond and recover such damages as he may be entitled to.

But it was not intended that the claimant or purchaser should not have the right of action upon the bond in case the officer made himself liable by failing to return the bond or take good surety. They may still maintain an action against the officer upon his official bond when he has become liable, or against the obligor of the indemnifying bond. There is no reason why the claimant or purchaser may not immediately have an action against the obligor in the indemnifying bond, who directed and caused the levy and sale of the property, nor is it inhibited by the Civil Code.

Wherefore, the judgment of the court below sustaining the demurrer to the petition is reversed and this cause is remanded, with directions to overrule the demurrer and for other proceedings consistent with this opinion.

J. S. & R. W. Hocker for appellant.

Welch & Saufley for appellees.

ABSTRACTS OF KENTUCKY DECISIONS.

STUCKY v. BELL.

Filed September 10, 1881—Not to be reported.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor, affirming.

Separate estate of the wife can not be charged with the payment of a debt incurred by her unless it is shown that the parties intended to charge the separate estate at the time the debt was created.

A. Cary for appellant.

Samuel McKee for appellee.

SMITH v. COMMONWEALTH.

Filed September 15, 1881—Not to be reported.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Hargis, reversing.

Pool selling neither wager nor game—The indictment for permitting gaming, in this case, charged the defendants with permitting a game of chance on premises occupied by them and under their control, by knowingly allowing pools to be sold on fair grounds of which they were the managers.

Judgment of conviction is, therefore, reversed.

Nat. A. Porter and Rodes & Little for appellant.

John M. Porter for appellee.

GOODIN, &c. v. GOODIN, &c.

Filed September 14, 1881—Not to be reported.

Appeal from Larue Circuit Court.

Opinion of the court by Judge Pryor, affirming.

The mere fact that a conveyance is made by a father to his daughter and her husband, for no other consideration than that of love and affection, will not deprive the husband of his joint interest in the estate.

The court say: "Cases frequently occur where commissioners in dividing lands, to which feme coverts are entitled by inheritance, have conveyed the lands to both husband and wife, and in which it has been held the commissioner has no right to deprive the feme of her inheritance without her consent; but where the father or donor undertakes to make the conveyance in that way, in the absence of some fraud or mistake in its execution, the aid of the chancellor can not be invoked to cancel the deed or declare the existence of a trust."

W. H. Chelf, Wm. Lindsay and J. W. Twyman for appellants.

T. A. Robertson for appellees.

SMITH v. COMMONWEALTH.

Filed September 15, 1881—Not to be reported.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Hargis, affirming.

Gaming table—"Wheel of fortune"—The defendants were indicted, in this case, for knowingly permitting "a machine and contrivance used in betting and other games of chance" to be set up and exhibited on premises in their occupation and under their control.

Held—That the words "gaming table," as used in section 7, chapter 47 of the General Statute, are intended to include any sort of machine or contrivance used in betting or other game of chance.

Nat. A. Porter and Rodas & Little for appellant.

John M. Porter for appellee.

DOHONEY v. LYON.

Filed September 15, 1881—Not to be reported.

Appeal from Adair Circuit Court.

Opinion of the court by Judge Pryor, affirming.

Agent must act within his authority—An agent to collect notes has no right to purchase mules with the notes, or to speculate in mules so purchased, and, therefore, his principal, who held the notes for collection, is properly charged with the amount of the notes in this case.

T. C. & F. R. Winfrey for appellant.

Wm. Stewart, Hindman & Sampson and Rhorer & Jones for appellee.

VAUGHAN v. OWSLEY.

Filed September 16, 1881—Not to be reported.

Appeal from Cumberland Circuit Court.

Opinion of the court by Judge Pryor, affirming.

Homestead right is waived by absolute deed or mortgage—Where the husband and wife convey the whole estate, whether in the nature of a mort-

gage or by absolute deed, without limitation as to the rights of either, the homestead passes. (Wing v. Hayden, 10 Bush, 276; Robbins v. Cookendorfer, 10 Bush, 629.)

Scott, Walker for appellant.

LEE v. COMMONWEALTH.

Filed September 17, 1881—Not to be reported.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Lewis, affirming.

House breaking—The defendant in this case was convicted of house breaking under section 4, article 6, chapter 29 of the General Statutes.

Held—That the indictment substantially, in the language of the statute, is good.

Weden O'Neal for appellant.

P. W. Hardin for appellee.

COMMONWEALTH v. WAMMOCK.

Filed September 17, 1881—Not to be reported.

Appeal from Carter Circuit Court.

Opinion of the court by Chief Justice Lewis, affirming.

The indictment against the county judge of Carter county for failing to vacate his seat, after sworn objection by written affidavit, was insufficient in this case.

The county judge of Carter county was indicted under "An act providing for special judges of county courts in certain cases in the counties of Carter and Elliott," approved April 22, 1880.

"As the legislature has, by the special statute under which appellant was indicted, imposed the same penalties for the refusal of county judges of Carter and Elliott counties to vacate their seats that are prescribed by law against circuit judges who fail to give way to special judges, it is proper to assume that it was intended that the same reasons for the vacation of his seat by the regular judge should exist and be presented in the one case as in the other."

The indictment failing to set forth these reasons is fatally defective.

P. W. Hardin for appellant.

W. C. Ireland for appellee.

MAYS v. COMMONWEALTH.

Filed September 17, 1881—Not to be reported.

Appeal from Graves Circuit Court.

Opinion of the court by Chief Justice Lewis, affirming.

1. The indictment stating substantially in the language of "An act to regulate the sale and giving away of spirituous, vinous or malt liquors in the city of Mayfield, Graves county, or within one mile of said city," approved February 9, 1878, was held, in this case, to be good.

2. Instruction to the jury that they must find the defendant guilty, if they believed he, within one year before the finding of the indictment, sold to H. any whisky, brandy, wine, gin, alcohol or mixture thereof, without a

written prescription given by a regular, practicing physician, so far from being prejudicial to the defendant was more favorable than the statute authorized.

3. The statute is violated when a sale is made without the prescription of a regular, practicing physician whether the purchaser be sick or well.

Samuel H. Crossland for appellant.

P. W. Hardin for appellee.

FANNIN, &c. v. MURRAY, &c.

Filed September 17, 1881—Not to be reported.

Appeal from Lawrence Circuit Court.

Opinion of the court by Judge Pryor, affirming.

Amended petition, corresponding to the proof and curing defect in the original petition, was properly allowed to be filed by the lower court.

The original petition failed to allege that the contract for the sale of the land in controversy was in writing. The amended petition curing that defect was properly permitted to be filed by the lower court after proof of the execution of the bond for the land.

George N. Brown and James E. Stewart for appellants.

W. C. Ireland for appellees.

PATTERSON, &c. v. GRAY.

Filed September 17, 1881—Not to be reported.

Appeal from Davless Circuit Court.

Opinion of the court by Judge Pryor, reversing.

1. Presumption against the advantageous divisibility of town lots—The Court of Appeals will presume that a lot in a town or city is not susceptible of an advantageous division. (*Faught v. Henry*, 13 Bush, 471.)

2. This presumption may be rebutted by proof showing that it is to the interest of all parties that the division be made.

R. W. Slack for appellants.

McHenry & Haynes for appellee.

JAMES' ADM'R v. CITY OF PADUCAH.

Filed September 20, 1881—Not to be reported.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Hargis, affirming.

For excess of cost of street improvement, over the amount to be realized by sale of adjacent property chargeable with the cost of the improvement, the city of Paducah is held to be liable.

In this case the city caused the street to be built across private grounds not dedicated or legally appropriated to street uses.

P. D. Yeiser for appellant.

ELLIS v. COMMONWEALTH.

Filed September 20, 1881—Not to be reported.

Appeal from Shelby Circuit Court.

Opinion of the court by Judge Hargis, affirming.

1. Offenses improperly joined in indictment—An election by the Commonwealth as to which of two offenses, improperly joined in an indictment, it will prosecute in legal effect obliterates from the indictment the charge not selected.

2. An indictment is sufficient which states the acts constituting the offense in such a manner as to enable a person of common understanding to know what is intended.

3. The absence of a lawful fence does not furnish an excuse to one who commits an intentional trespass by driving his cattle into a field not enclosed as required by law.

4. Injury to growing grass is injury to real estate.

5. In the absence of what was detailed by the witnesses the law presumes that it was sufficient to authorize and sustain the verdict. -

Bullock & Beckham and Wm. Lindsay for appellant.

Carroll & Barbour, J. S. Morris and P. W. Hardin for appellee.

LINDSAY v. SMITH.

Filed September 20, 1881—Not to be reported.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Hargis, reversing.

1. Part payment of a partnership debt by one partner paying 40 per cent. in full satisfaction thereof, does not entitle him to recover of his co-partner one-half of the full amount of the debt.

After dissolution of partnership, in this case, one partner executed his individual note for partnership debts, amounting to \$454.95, and afterwards discharged the note by paying forty cents on the dollar.

The court say: This was a partnership debt which appellee paid, and he had no right, by executing his own note and paying it off at forty cents on the dollar, to recover from his partner, for whom he was acting as agent, the sixty per cent. he had made by the transaction.

After, as well as before, dissolution partners are required to act with the utmost good faith with one another, and whatever either may make in the adjustment of a partnership debt inures to the benefit of the other unless the contract of dissolution provides otherwise.

2. Different causes of action which may be joined are not by law compelled to be united, unless there be such a multiplicity as would, by separate prosecution, result in vexation and oppression.

W. H. Holt for appellant.

J. J. Cornelison for appellee.

MUNDAY v. GOODLOE.

Filed September 22, 1881—Not to be reported.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Pryor, affirming.

No question of law involved in this case.

T. N. Allen for appellant.

D. G. Falconer for appellee.

BROWN v. BROWN.

Filed September 22, 1881—Not to be reported.

Appeal from Franklin Court of Common Pleas.

Opinion of the court by Judge Pryor, affirming.

Construction of Orlando Brown's will—The support of the testator's daughter, Euphemia, and the maintenance of his family are made by his will a charge upon his entire estate, and the surviving executor is empowered to sell so much thereof as is necessary for that purpose.

Hugh Rodman for appellant.

D. W. Lindsey for appellee.

BROOKS v. BROOKS.

Filed September 22, 1881—Not to be reported.

Appeal from Webster Circuit Court.

Opinion of the court by Judge Hargis, reversing.

Dismissal of appeal, without prejudice by a quarterly court is not a bar to a subsequent appeal taken within sixty days after judgment was rendered by the justice.

Towery & Hill for appellant.

CAVANAUGH v. FRIED.

Filed September 22, 1881—Not to be reported.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor, reversing.

1. A garnishee should be required by rule to bring the money into court or to produce the property, that it may be sold.

2. A personal judgment should not be rendered when none is asked, nor where there is no cause of action alleged upon which to base it.

Lane & Harrison for appellant.

D. M. Rodman for appellee.

BARNES, &c. v. GREEN, &c.

Filed September 22, 1881—Not to be reported.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Pryor, reversing.

An order of court enjoining creditors from proceeding at law to coerce payment of their claims made in a proceeding by an administrator for the settlement of an estate as an insolvent estate, does not prevent the statute of limitation from running against claims filed in the action, but not properly verified.

In this case the administrator filed his petition in 1864 for the settlement of the estate, and obtained injunction against creditors. Sundry creditors filed their claims without sufficient verification, and in 1866 or 1867 the petition and proceedings under it were filed away. In 1877 the widow and children of decedent filed a petition against the administrator for a settlement of his accounts and for judgment against him. On motion of the defendant

creditors who had filed their claims the old suit was redocketed and consolidated with the action of the widow and children, and they asked the court to render judgment for their claims. Held—That the claims, each and all of them, should have been rejected. first, because they were not properly verified; second, because the statute of limitation pleaded by the widow and children barred a recovery on said claims.

Chenault & Bennett for appellants.

J. W. Caperton for appellees.

REESE v. BRAMMEL.

Filed September 24, 1881—Not to be reported.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Hargis, affirming.

The rejection of a competent witness whose testimony, as avowed, was insufficient to establish the cause of action, when the other facts not avowed and which are necessary to establish the cause of action are not testified to by others, was not prejudicial to the plaintiff in this case, and furnished no ground for reversal.

L. W. Robertson, E. L. Worthington and J. H. Sallee for appellant.

Wadsworth & Sons for appellee.

HINES' HEIRS, &c. v. PURDON, &c.

Filed September 24, 1881—Not to be reported.

Appeal from McCracken Court of Common Pleas.

Opinion of the court by Judge Hargis, reversing.

No question of law involved in this case.

J. B. Husbands for appellants.

Charles S. Marshall for appellees.

HACKWORTH v. THOMPSON.

Filed September 24, 1881—Not to be reported.

Appeal from Lewis Circuit Court.

Opinion of the court by Judge Pryor, affirming.

On a second appeal the Court of Appeals will not go behind the first decision and decide a question which was, or could have been, raised on the first appeal.

On the first appeal in this case the court reversed the judgment of the lower court discharging an attachment levied on land, and remanded the case with directions to sell the land.

On the second appeal the court can not go behind the first decision, and decide that the levy was void because of uncertainty in the description of the land. Whether the levy was void or not was necessarily considered, or could have been considered, on the first appeal, and, therefore, it is too late to raise that question on the second appeal.

W. H. Cord for appellant.

A. Duvall for appellee.

HARGETT v. BRACKEN COUNTY.

Filed September 24, 1881—Not to be reported.

Appeal from Bracken Circuit Court.

Opinion of the court by Judge Pryor, affirming.

1. In determining the value of services rendered great latitude must necessarily be given to the jury, and, although the preponderance of the evidence may be in favor of the appellant, the Court of Appeals can not reverse unless the verdict appears to be flagrantly wrong.

2. "A jury, in such a case, may, upon the admission of the fact that the services were rendered and a reasonable compensation to be made, determine the value of the services without proof, and are not compelled to place as high an estimate, in this class of cases, on the work done as the weight of evidence may indicate."

H. C. Weaver for appellant.

CITY OF OWENSBORO v. ELDER.

Filed September 28, 1881—Not to be reported.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Pryor, affirming.

1. Money received by a city in consideration of a license to sell spirituous liquors can not be retained if the city fails to issue a valid license.

2. "It was not necessary to allege that he (the person to whom the license was issued) received no benefit from the license issued. This is not like a case where the city has improved the property of a party, although under a void ordinance. The party paying will not be allowed to recover the money back when he has derived such benefits as would have resulted from the labor expended, if the ordinance had been a valid one."

George W. Jolly for appellant.

Williams & Powers for appellee.

TURNER v. HOGAN.

Filed September 23, 1881—Not to be reported.

Appeal from Grant Circuit Court.

Opinion of the court by Judge Pryor, affirming.

1. Erroneous instructions may be cured by other instructions—"The objection to the instruction given for the plaintiff should have been sustained, but the error was cured by the instruction given for the defendant in such a manner as the jury could not have been misled."

A. G. DeJarnette for appellant.

Collins & Fenley for appellee.

The death of James A. Garfield, President of the United States, at 10.35 p. m. Monday, September 19, 1881, from the effects of a wound inflicted by Charles J. Guiteau, a disappointed officeseeker, July 2, 1881, is, and will be in all time to come, a notable event in the history of the United States.

The lesson derivable from this mournful event, and the remedy for the evils in the administration of the affairs of government which brought it about, or made it possible, in a free government like ours, where the loftiest places are reached by the meritorious without regard to classes in society or any distinction depending upon birth or family connection, is a subject which should engage the most careful study of our ablest philosophers and statesmen.

It seems to us that the assassination of President Garfield is the legitimate fruit of the times—the legitimate fruit of the sentiment and feelings which must necessarily spring up and be fostered in the minds of men who take an active part in politics in order that they may claim an office as a reward for services rendered and crimes perpetrated under the direction of party leaders to secure party success.

When bad men, in desperate social or financial condition, capable of perpetrating any crime, are taken up during hot political canvasses and caressed and thrust into the front of the canvass, because of their willingness and capability in perpetrating the crimes which are necessary to secure success, as has been notoriously the fact in the recent presidential canvasses, it is but natural that such bad men should claim, after the canvass has terminated successfully, the offices that had been promised them, or such offices as they believe their party crimes and party services merit. Such men have been so often rewarded by appointments to lucrative public offices that it is but natural that they should feel that gross injustice is done them if they are not thus rewarded. When the offices promised to them, or sought by them in consideration of the crimes they have committed to secure party success, are refused and no satisfactory rewards for their party services or crimes are offered them, it is but natural they should harbor a spirit of resentment against those who, in their estimation, have

wronged them by refusing to give them such offices as they feel they have earned and are due to them.

So long as party canvasses and party rewards are conducted and bestowed in such manner as has been notoriously the case for some years past, it may be expected that a desperately bad and disappointed officeseeker will now and then turn up who will, like Guiteau, seek an office as a reward for his party services, and, being disappointed, will slay the high functionary who disappoints him in what he believes to be his reasonable expectations from his party, in order that another may be installed in his place whom he regards as more favorably inclined to yield to his importunities.

We have too much partyism, too much partisan politics, too many public offices, created for party and partisan purposes, to give lucrative positions as rewards for party services and party crimes.

What the country needs, as a guaranty against further assassinations of high public functionaries, is a thorough civil service reform, a large reduction in the number of public offices, and the appointing powers so regulated as to make appointments depend upon fitness and not upon partisan or political services, and not subject to change with every change of administration.

THE CIRCUS MOB IN FRANKFORT.

The unlawful proceedings in Frankfort, on the 16th of September, by which the police force of the city was overpowered and unlawfully prevented from enforcing the ordinances of the city, and the gross misunderstanding of the facts by the public make it necessary that those facts should be correctly stated, as upon them some important legal questions may be raised.

FACTS.

1st. Before Adam Forepaugh's circus train arrived in the city the agents of the railroad company were notified that the train would not be allowed to be unloaded in the streets of the city. The statement in the papers and petition filed by the agent of the railroad company that the company was not notified that it would not be allowed to unload in the city is not true.

as the agent himself admitted in his evidence and card published in the Yeoman. There was no objection to the unloading at any place except in the public streets of the city, and they could have, without much inconvenience, unloaded at some place in or near the city and not in the public streets.

2d. The agent of the railroad company having determined to unload in the streets of the city, filed a petition in the Franklin Circuit Court against the board of councilmen of the city and obtained an order for an injunction as follows:

"W. Franklin, Clerk Franklin Circuit Court, will, upon execution of bond, as required by law, in the sum of \$500, issue an order enjoining and restraining the defendant, its agents, police officers and employes from interfering with the plaintiff in unloading and reloading the circus equipments, troop and appurtenances of Adam Forepaugh within the limits of the city of Frankfort.

"R. A. THOMSON, P. J. F. C. C."

The clerk of the court issued a summons against the defendant, the board of councilmen, and indorsed on it the following injunction, to wit:

"The defendant, the board of councilmen of the city of Frankfort, its officers and agents, are enjoined and restrained from interfering with the unloading and reloading of Forepaugh's circus from the cars of the plaintiff within the limits of the city of Frankfort until the further order of this court.

"W. FRANKLIN, C. F. C.,

"By ROBERT FRANKLIN, D. C."

3d. Having been informed that evil-disposed persons had threatened to resist the police force if they attempted to prevent the unloading of the circus cars in the public streets, Mayor Taylor went in person to Market street, in which the circus trains stopped, for the purpose of assisting the police in preserving the peace and enforcing the ordinances of the city. At this time there was considerable excitement on the streets, and threats against the police force were freely and openly indulged in and encouraged by persons who were known to be personally hostile to the mayor.

Under these circumstances Sheriff Hawkins delivered a copy of the summons and injunction to Mayor Taylor, who imme-

diately consulted with the city attorney, Hugh Rodman, Esq., who advised him that if he disregarded the injunction he would be in contempt of court. The mayor, believing that the injunction had been granted without any just grounds and to aid the mob that was threatening to resist the police, believed it was his duty to see that the peace was preserved and the ordinances of the city enforced notwithstanding the injunction, and being threatened with violence and resistance by the excited crowd of bystanders, for the purpose of deterring them from violating the law, and for his own security, he threatened to shoot the first man who attempted to unload the circus cars in the public streets of the city, and preserved the peace, and prevented any violation of the ordinances of the city until the sheriff unlawfully put himself at the head of those who were threatening to resist the mayor with the McCreary Guards under his unlawful command.

4th. What next occurred the Yeoman describes as follows:

"There was an immense crowd at the depot and along the whole length of the train, which extended past several blocks. Several thousand persons were packed into the street, and the whole city was in a state of excitement. It was announced that the mayor had openly defied the law, and had arrayed himself and his police force against the authority of the State. This being made known to Judge Thomson, he immediately ordered the sheriff to proceed to the train and see to the execution of his order of injunction. The sheriff, Mr. E. O. Hawkins, believing that there was an armed resistance, and that he was without sufficient force to enable him to carry out the order of the court, went to the governor and asked that the McCreary Guards be directed to report to him. The Governor having a personal knowledge of the trouble, and knowing that great excitement prevailed in the city, promptly complied with the request, and the troops were ordered out. At a quarter past 4 o'clock they appeared and went in double quick to the train where they, under the direction of the sheriff, took the mayor from the crowd, dispersed the police force, and saw that the cars were unloaded without molestation."

WHO DEFIED THE LAW ?

1st. The mayor and police force of the city did not "defy the law" by attempting to preserve the peace and enforce the ordinances of the city, nor did they create the excitement.

On the contrary, the excitement was created by those lawless and evil-minded persons who threatened, and encouraged others to threaten, to resist the police force of the city. The excitement was much increased by the false clamors raised by the mob and by men who were personally hostile to the mayor, that he "had openly defied the law, and had arrayed himself and his police force against the authority of the State," when in matter of fact he and the police force were preserving the peace and enforcing the ordinances of the city.

2d. When County Judge Thomson made the order directing the clerk to issue the injunction he had no further power or authority whatever in the case—he had no authority under any circumstances whatever, either verbally or in writing, to order Sheriff Hawkins "to proceed to the train and see to the execution of his order of injunction." Did Judge Thomson defy the law, by giving the order to the sheriff when he had no authority, power or jurisdiction to do so?

3d. When Sheriff Hawkins delivered the copy of the summons, with the injunction endorsed thereon, his power in the case was exhausted. He derived no power or authority whatever from the unauthorized order of Judge Thomson, and had no power or authority whatever "to proceed to the train and see to the execution of his (Judge Thomson's) order of injunction." He had no process of any kind in his hands to be executed upon Mayor Taylor or the police force of the city. He had no authority whatever to go to the governor and ask that the "McCreary Guards be directed to report to him," and on the application as made to him the governor had no warrant of law for complying with the unauthorized request of Sheriff Hawkins, by ordering the McCreary Guards to report to him.

Did Sheriff Hawkins defy the law when he, without any authority whatever, undertook to execute the unauthorized and illegal order of Judge Thomson, by unlawfully calling on the governor to order out the McCreary Guards, or by unlawfully

using the McCreary Guards when he "took the mayor from the crowd, dispersed the police force, and saw that the cars were unloaded without molestation?" And also saw that the public streets of the city were converted for about two hours into a circus stock yard to the great inconvenience of many citizens and in defiance of the ordinances of the city?

It may be, and probably ought to be, conceded that all the parties acted innocently under the excitement instigated by evil-minded persons; but, however this may be, by the unlawful conduct of the county judge and sheriff, and the unlawful use of the McCreary Guards, the mayor and police force of the city of Frankfort were prevented from enforcing the ordinances of the city, and Forepaugh's circus cars were unloaded in the public streets of the city of Frankfort in open defiance of the mayor, police and ordinances of the city.

No doubt the governor supposed that Sheriff Hawkins had some process to execute when he applied to him for the McCreary Guards; otherwise he would not have ordered the guards to report to him. That it is possible that the guards could be used to aid a mob, or to aid the sheriff unlawfully at the head of a mob, in unlawfully taking the mayor and dispersing the police force of the city, shows conclusively that there is some defect in the law under which the State militia may be ordered to report to a sheriff.

A sheriff without any process in his hands, hooted on by a mob of excited persons who are threatening to resist the mayor and police force of a city whilst they are engaged in keeping the peace and enforcing the ordinances of the city, should not have it within his power, by any unlawful call upon the governor, however sudden, to have troops placed at his command to enable him to violate the law by unlawfully arresting the mayor and unlawfully dispersing the police force of the city.

NOTES.

The Court of Appeals entered upon its September term the first Monday in September, having about five hundred cases already submitted, and a large docket for the ensuing term.

October. 1881—5

Chief Justice Joseph H. Lewis, elected at the recent August election to fill out the remainder of Chief Justice Cofer's term, entered upon the discharge of the duties of his high office at the beginning of the present term. He brings to the bench a mind well disciplined by ripe scholarship, long experience at the bar, and experience upon the circuit bench. He has the highest respect for the law as it is, and being essentially conservative in his general make up and habits of life, may be confidently relied upon as standing opposed to all innovations which may be calculated to disturb or unsettle well-established precedents. His vigorous constitution, large intellectual endowments, regular and assiduous habits of life, devotion to duty and high appreciation of the dignity and obligations of his position give assurance that he will well and faithfully discharge the duties incumbent upon him.

Judge Hines being afflicted with a catarrhal affection of the throat, under the advice of eminent physicians, has gone to Colorado, expecting to be relieved in a few weeks. It is earnestly hoped that he will return, at an early date, permanently restored. His necessary absence is very unfortunate for the court as, until his return, the great number of submitted cases already in the hands of the judges will be increased, as it is utterly impossible for any three, or even any four, men in good health to dispose of all the business of the court and dispense justice, according to the constitutional requirement, by due course of law, and without delay.

The amount of labor required by the Constitution, laws and exigencies of the increased population and business of the State to be performed by four judges of the Court of Appeals is now so great as to make it absolutely necessary that some means should be devised for the relief of the court, or to enable it to decide the cases submitted to it without unreasonable delay.

In our next number we will suggest a plan for the relief of the court; and in the meantime will be obliged to members of the bench and bar of the State for suggestions upon this subject.

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BIGGS, &c. v. LEX. & BIG SANDY R. R. CO., E. D., &c.

(Filed October 1, 1881.)

1. Limitation against action to correct a mistake—An action for compensation for a material deficit in lands sold under a mistake as to quantity must be brought within five years from the discovery of the mistake, if payment has been made before such discovery.

Payment and discovery must concur before a recovery can be had.

2. Injunction did not prevent statute from running—The granting of an injunction in this case did not stay the appellee's action; it only prescribed when and how he should institute it; and appellee will not be allowed to deduct any time by reason of the granting of the injunction, and thus reduce the period below the requisite statutory bar.

Appeal from Boyd Circuit Court.

Opinion of the court by Judge Hargis.

In consideration of \$60,000, payable in different installments on or before March 7, 1866, R. M. Biggs, deceased, by written contract, sold and agreed to convey by general warranty deed to Hartman & Coleman five parcels of land, which were stated as "containing three thousand and seven hundred acres."

The writing embraced this stipulation: "The lands are to be surveyed, and if they run short the said Biggs is to make a deduction in proportion, and if they overrun, the said Hartman & Coleman are to pay in proportion."

On the 24th of February, 1866, Hartman & Coleman solicited and accepted a quit-claim deed from Biggs and wife, conveying to them four instead of five parcels of the land mentioned in the written contract, and acknowledging payment of the consideration.

By a similar deed, dated April 11, 1866, Hartman & Coleman and James M. Baily conveyed said lands and some other

small parcels to the Western States Coal Oil and Mining Co. in consideration of \$249,000 in hand paid.

Thereafter, on the 15th of February, 1867, Biggs and wife executed a second deed to Hartman & Coleman, with covenant of general warranty, for the four parcels of land described in their deed of February 24.

The Western States Coal Oil and Mining Co., by quit-claim deed dated on the 19th of February, 1869, conveyed the lands purchased by Hartman & Coleman from Biggs to the appellee, the Lexington & Big Sandy Railroad Co.

On the 30th of April, 1869, Hartman & Coleman and Baily, in writing, assigned and transferred to the appellee company the warranties contained in the deeds from Biggs to them, and all rights or causes of action they then or thereafter might have by reason of the breach of the warranties or covenants contained in Biggs' deeds to them.

Biggs having been killed by the explosion of the boilers of the steamboat Harry Dean, James L. Warring was, at the June term, 1868, of the county court, appointed his administrator.

On the 27th of October, 1868, the administrator filed his petition in equity to settle his intestate's estate, the personality of which he alleged was insufficient to pay his debts.

He described the lands of the estate, prayed to have enough of them sold to pay the debts, and "that all claimants be enjoined and restrained * * * of all suits and proceedings on any of their demands except by proceeding herein."

November 2, 1869, the appellee company filed a petition, setting forth a claim for a large deficit in the lands deeded by Biggs to Hartman & Coleman, whom it joined in the petition by their alleged consent.

It based its claim to the value of the deficit on the above-named assignment to it by Hartman & Coleman. The suit progressed until November 13, 1871, when Hartman & Coleman appeared, and on their motion had the cross petition of the appellee company discontinued as to them, and they were dismissed as plaintiffs in said cross petition.

On the 28th of October, 1878, they joined the appellee company in an amended petition, alleging that they were dismissed

as plaintiffs in the petition seeking to recover for the deficiency, "upon the idea that said cause of action was vested in the Lexington & Big Sandy Railroad, Eastern Division," and asked "to be reinstated as co-plaintiffs in the petition, setting up the claim."

They were accordingly reinstated as co-plaintiffs with the railroad company.

During that term of court the appellants, the administrator, widow and heirs of Biggs, filed an amended answer, pleading in apt language the statute of five years' limitation to the cause of action for the alleged deficit.

Upon hearing the cause the court below rendered judgment in favor of the appellee company against the appellants for the sum of \$19,400, with interest from the 24th of February, 1866, for the deficiency, which was adjudged to be 1,197½ acres, and they have appealed to this court, asking a reversal of that judgment.

There are several imposing grounds urged by appellants for a reversal upon the merits of the case, but none of them will be considered in this opinion as the plea of limitation, in our judgment, presents a complete bar to the recovery for what deficit soever there may be.

The general principle of law authorizing an action for compensation for a material deficit in lands sold under a mistake as to the quantity was long since well established, but the right of recovery greatly depends upon the nature of the purchase, the circumstances, knowledge and conduct of the parties.

This right of action is based upon the contract, which the law implies as the result of justice and reason growing out of the mutual mistake of innocent parties, and is barred by the lapse of five years from the discovery of the mistake, if payment be made before that event. (*Dye v. Holland*, 4 Bush, 686.) Payment and the discovery of the mistake must concur before a recovery can be had.

Under the rule that at the instant the cause of action accrues limitation begins to run, it starts on its course from the moment of payment as the cause of action then accrues; but our statute and adjudications restrain its operation upon the

cause until the mistake shall be discovered, if that occurs within ten years after the contract.

Here the mistake was discovered in June, 1867.

From the death of Biggs to the appointment of his administrator, and for six months thereafter, less than one year expired.

Deduct that period from the time which elapsed from the discovery of the mistake to the reinstatement of Hartman & Coleman as plaintiffs, and it will be seen that more than five years and four months are left, which sustains the plea of limitation, unless the cause of action had been assigned to the appellee company by Hartman & Coleman; or, if not assigned, they were obstructed in their right to sue by the injunction obtained at the commencement of the administrator's suit to settle his intestate's estate.

The unambiguous language contained in the paper evidencing the assignment must control this question, as neither fraud nor mistake in its execution is sufficiently shown by the evidence, and without such evidence parol testimony is incompetent for the purpose of contradicting or explaining it.

The assignment specifically transfers the benefit of the warranties and covenants contained in Biggs' deed, and any cause of action that had or might accrue by reason of their breach.

Neither of the deeds contains any warranty of quantity. The lands are described in them by metes and bounds, and "supposed to contain in the whole thirty-seven hundred acres, be it more or less."

It is true that any cause of action arising on the warranties would run with the land, and pass by similar deeds; but the action to recover compensation for the deficit could not arise from the breach of any warranty or covenant in either of the deeds named for the simple reason that there is no undertaking or warranty in them that the lands contained the quantity mentioned.

Besides, this court has held too often that the remedy for a deficit, where such deeds as these exist, is based on an implied assumpsit to refund the money paid by mistake that results from ignorance, accident or confidence. (*Crane v. Prather*, 4

J. J. M., —; Dye v. Holland, 4 Bush, —; Young v. Craig, 2 Bibb, —; Harrison v. Talbot, 2 Dana, —, and cases therein cited.)

The cause of action, therefore, on the implied promise to render compensation for the deficit remained with Hartman & Coleman, as no assignment thereof to the appellee company is shown to have been made.

Whether they can be allowed to deduct any time by reason of the grant of the injunction at the instance of the administrator, and thus reduce the period below the requisite of the statutory bar, is the only remaining question of importance urged by counsel that need be touched.

While the British authorities relied on to sustain appellee's view go far to support it, yet the English chancery practice, formed under the influence of English statutes and institutions, has never been fully adopted in this State, counsel contend that section 12, article 4, chapter 71, General Statutes, is conclusive of this point.

∴ A part of that section reads: "When * * * the commencement of an action is stayed by injunction the time of the continuance of the injunction is not part of the period limited * * * for the commencement of the action."

In point of fact, were this section applicable to the question before us, we hardly see how Hartman & Coleman have placed themselves within its protection against the lapse of time pleaded, for they appeared in connection with the railroad company, and actually asserted the claim on the 2d of November, 1869, and afterwards voluntarily abandoned its prosecution until October 28, 1873. Certainly the commencement of their action was not stayed beyond the time at which they presented it, and this did not result from the injunction, because it is alleged in their first pleading that "the delay in presenting this claim arises from the facts that the company petitioning only within a few months past became entitled to the rights herein asserted," and that Hartman & Coleman resided in Pennsylvania.

And there is no evidence in this record that shows they were laboring under the mistaken belief that the injunction would

be violated by their instituting a suit on the claim in the action brought by the administrator.

The prosecution of suit upon their claim in this action was embraced in the exception stated in the prayer of the administrator's petition, which in effect asked that all claimants be not only permitted but required to prosecute their claims in the proceedings for the settlement of the estate.

The injunction granted did not stay appellee's action; it only prescribed where and how he should institute it.

The power to grant such an injunction is given by the 486th section of the Civil Code, and its provisions are founded on principles of equality and justice, and is intended to prevent a multiplicity of suits where one will furnish a remedy to all parties who may be interested.

In the case of Barnes, &c. v. Green, &c., MSS. Op., September, 1881 (by Judge Pryor), this court sustained the plea of limitation where an injunction had been granted against suits of creditors at the instance of the administrator on his filing a petition for settlement of the estate.

With these views of the law of this case the exclusion and admission of evidence specified in the assignment of errors was prejudicial to the appellants' rights, and forms a reversible error, as the court might and ought, with the illegal evidence excluded and the relevant evidence admitted, to have rendered judgment rejecting the claim for the deficit on the plea of limitation.

As the plea of limitation is fatal we are constrained so to decide, and forego an adjudication upon the merits of the controversy.

Wherefore, the judgment is reversed and cause remanded, with directions to sustain the plea of limitation and dismiss appellees' cross petition.

E. F. Dulin and Wm. Lindsay for appellants.

L. T. Moore and W. H. Wadsworth for appellees.

PARROTT, &c. v. KELLY, &c.

(Filed October 4, 1881.)

Wife may will her estate to her husband, when, etc.—A conveyance by husband and wife of the real estate of the wife to a third person, who re-conveys it to the separate use of the wife, with power to dispose of it by will, confers upon the feme covert the power to devise the real estate to her husband, if the conveyance and the execution of the will are made without fraud or undue influence.

Appeal from Washington Circuit Court.

Opinion of the court by Judge Pryor.

The will of Catherine Ellery was admitted to probate in the Washington County Court in the year 1877. At the date of the will, and when executed in September, 1857, the testatrix was a married woman, the wife of John Ellery, and to whom she devised her whole estate. An appeal was prosecuted to the circuit court of that county from the order of the county court, and the probate sustained. It seems from the facts contained in the record that Mrs. Ellery had no children, and was desirous of securing her estate to her husband, and in order to accomplish her purpose she and her husband united in a conveyance to her sister, Mrs. Polin, of her real estate, expressing the consideration of love and affection, and the nominal consideration of \$1 in hand paid. Her sister then reconveyed the land to Mrs. Ellery for her separate use, to be held free from any claim of the husband, and also empowered her to dispose of it by last will and testament. There is no charge of fraud or undue influence in the execution of either the deeds or the will of the testatrix, and the execution of each originated only from the desire on the part of the wife that her husband should have the estate, and the only question is, was Mrs. Ellery, by the execution of these deeds, invested with the power to execute the will, and the absence of a valuable consideration in the conveyance of her estate to her sister is the sole reason for invalidating that instrument.

It is conceded that she had the right to convey this estate to her sister, and that a reconveyance to the husband or to the two jointly would have passed the absolute title, but that the right to devise the property, either under the express power

given by the deed from the sister, or by reason of its being her separate estate, could not be conferred in that way.

In *Scarborough v. Watkins*, 9 B., M. —, and *Todd's Heirs v. Wickliffe*, 18 B. M., —, and in the subsequent case of *Kennedy v. Tenbroeck*, this court held that conveyances made by the husband and wife for the purpose alone of having a reconveyance, so as to vest the husband with the estate or an interest in it, was valid, and we see no reason why the wife may not be invested with the power to make a will in the same manner. As long as she is under the disability of coverture she has no power to devise her general estate under our present statute, or to convey her real estate except in the manner provided by law; and as was said in the case of *Kennedy v. Tenbroeck*, she can not by her own deed, or in conjunction with her husband, vest herself with any power over her estate. In that case the wife attempted at one time to execute a power of attorney to the husband to sell and dispose of all of her estate, and in discussing that branch of it this court held that such a power could not be created by the joint action of the husband and wife, but expressly held that a feme covert could be invested by deed, or will emanating from a third party, with a power of appointment in land; and further, that the conveyance of *Tenbroeck* and wife to *Barrett*, the trustee, to enable him to reconvey to the husband and wife and the survivor, with no other motive than to vest the husband with an interest in the wife's land, was valid. The husband and wife had the right to convey the land of the wife in the manner provided by the statute, and whether for a valuable or a mere nominal consideration, the title passed. There may be equitable grounds for cancelling the deed or will, but none exists in this case, nor could the question arise in such a proceeding. The right of a feme covert to sell and convey or mortgage her estate for the benefit of the husband is not questioned, and the power of the husband and wife to sell and convey to a third party the land of the wife, that it may be reconveyed to the husband, has been repeatedly recognized by this court; and when the right to convey in such manner is conceded, it seems to us, determines the question before us.

The husband and wife in this case united in a conveyance of the wife's land, signed and acknowledged as required by law,

passing to the sister of the wife the absolute title, and the latter being invested with the title, had the power to reconvey to the wife alone, or to the husband and wife jointly, with such restrictions and limitations on the title as the parties might desire. If the title passed to Mrs. Nolin she had the right to dispose of it so as to carry into effect the wishes of her sister, and that the title did pass has been too often decided by this court to require the citation of authority in support of it. Mrs. Ellery had no children, and the execution of the conveyance having been prompted by the love and affection for her husband, free from any improper influences, it was proper to admit the will to probate.

Judgment affirmed.

John W. Lewis for appellants.

R. J. Browne for appellees.

PHILLIPS v. BRECK'S EX'OR, &c.

(Filed September 28, 1881.)

A party seeking to enforce a vendor's lien for unpaid purchase money for land must allege and prove, if denied, the terms of the contract, the character of the title to be made, and his ability and willingness to convey according to the terms of the contract.

When the title is in the vendor's devisees or heirs, and the action is brought by a personal representative, he must allege their ability and willingness to convey, etc.

Appeal from Lee Circuit Court.

Opinion of the court by Judge Hargis.

In none of the pleadings filed by the executor, heirs or devisees is it alleged that the title to the "Yellow Rock" tract of land is in the devisees of Daniel Breck, deceased.

The right of action was in the executor for whatever sum the appellant may be indebted to his testator for the lands sold by the latter to him, and for which the appellant holds the bond of the testator for title; but it was not necessary or proper that he should aver he was able and willing to convey the title which his testator had covenanted to convey, for the manifest reason that he had no power under the will of the testator to make a conveyance. And as he could not, there-

fore, tender a sufficient title because the devisees held it, they were properly brought before the court, and should be compelled to convey in the event the executor makes out his cause of action.

But making them parties and their appearance did not dispense with the necessity of an allegation by them or the executor that they had a good title to the land described in the title bond of the devisor, because the title might be defective or they may have parted with it since it came to them.

It is essential to a recovery in a case of this character for the vendor, or, if he be dead, for his heirs or devisees, to allege and prove, if not admitted, the terms of the contract, the character of title to be made, and their ability and willingness to convey, except the heirs or devisees be infants, or refuse to convey as to such an allegation by the executor of the terms of the contract the character of title his testator agreed to make, and that the incapacitated or recalcitrant heirs or devisees had a good title to the land, or such a title to it as the testator had agreed to convey, and that they either lacked capacity or refused to convey, as the case may be, will be sufficient to authorize the court, when they are properly brought before it, to compel them to convey.

In all such cases as this it must be averred by either the executor or devisees in whom the title rests, that fact being essential to the formation of a material issue in the case should there be any dispute about it. (5 Littell, 8; 3 Bush, 187; 12 Bush, 104.)

The pleadings were insufficient to authorize a recovery on the notes executed for the Yellow Rock tract of land.

The preponderance of the evidence is that the appellant's true signature is attached to the paper filed by the executor as evidence of a settlement and the amount of payments made by the former to the testator.

The court below having so decided, we do not see how we can disturb its conclusions.

The alterations in the paper do not change its legal sense, and are, therefore, not material. We do not think that the substantial rights of the appellant have been affected by its

admission, notwithstanding the executor did not testify upon that question, and the paper was produced by him.

There is no evidence that he altered it, and we have seen the alterations added nothing to his interest, but hazarded the value of the papers as evidence. It can not be presumed that he would have committed such an act without motive and against his own interest.

Wherefore, so much of the judgment as is for the sale of the Yellow Rock tract of land, and for the amount of the notes executed for it, is reversed and cause remanded for further proper proceedings.

A. Duvall, Wm. Lindsay and S. F. J. Trabue for appellant.

I. N. Cardwell for appellees.

HUMPHREY v. HUGHES' GUARDIAN, &c.

(Filed October 4, 1881.)

1. Withdrawal of pleadings—A party to an action can withdraw any pleading, or at least it is within the discretion of the court to permit any pleading to be withdrawn, unless it works an injury to his adversary.

2. In an action on an assignment it is necessary to allege the consideration for the assignment, and the recovery is limited to the amount actually paid therefor. (Section 7, chapter 22, General Statutes.)

3. A party improperly uniting two causes of action should be compelled to elect which he will prosecute.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Pryor.

Humphrey, the former guardian of Sidney Hughes, had a settlement of his accounts with the (then) guardian, I. R. Miller, and was indebted to his ward in the sum of about \$320. He had loaned the ward's money to Smith and Lancaster, and held their joint note for the amount, and as a payment in full of all the demands against him as guardian he assigned this note to Miller. Miller instituted an action at law on the note, prosecuting it with all the diligence required of an assignee, and failed to make the debt, as is evidenced by a return of no property found made by the sheriff in whose hands the execution was placed. He then filed his petition, asking, as assignee, to recover of the appellant by reason of the assignment and the

insolvency of the obligors to the note. No other claim is asserted or any other cause of action mentioned.

The appellant filed an answer in which various defenses are relied on, and to this answer a demurrer was filed. The demurrer was subsequently withdrawn by the plaintiff against the objection of the appellant. A party to an action has the right, or at least it is within the discretion of the court, to permit any pleading to be withdrawn unless it works an injury to his adversary. The demurrer in this case went back to the petitioner, and as there was no allegation in that pleading of any consideration paid for the note, nor any damages alleged to have been sustained, either general or special, there was no cause of action presented, and in construing the pleading most favorable to the party making it, the recovery would have been merely nominal.

By section 7 of chapter 22, General Statutes, it is made necessary in an action on an assignment to aver the consideration for the assignment, and the recovery is limited to the amount actually paid. During the progress of the trial, the appellee filed an amended petition in the name of the ward, in which it is alleged that the appellant, as his former guardian, had failed to account for the moneys in his hands, and asked for judgment. This amendment ought not to have been allowed; it was a departure from the original cause of action by Miller, and the two counts could not have been united; but after permitting its filing the court should have sustained the motion of the appellant, and caused the appellee to elect which cause of action he would prosecute.

The pleadings in the action on the assignment show that the appellant and Miller had a settlement of all the accounts of the former as guardian, and that Miller accepted the assigned note in full discharge of the demand, and executed a receipt to that effect. This is binding on the appellee, Miller, and his remedy is against the appellant on the assignment, unless the appellee can avoid the settlement and cancel the receipt on some equitable ground. The appellee must prosecute his action on the assignment, and with this view he should be allowed to amend his petition, or it should be dismissed without prejudice.

Judgment reversed and cause remanded for further proceedings consistent with this opinion.

Muir & Wickliffe for appellant.

C. A. Wickliffe for appellees.

TURNBULL v. COMMONWEALTH.

(Filed October 6, 1881.)

1. Husband is an incompetent witness against his wife.
2. Judgment in a criminal case reversed for an error not specified in the grounds for new trial—It is not necessary that the error of the court in admitting incompetent evidence be relied upon in a motion for a new trial in order to enable the accused to avail himself of that error upon appeal.

Appeal from Grant Circuit Court.

Opinion of the court by Chief Justice Lewis.

Appellant, Sarah J. Turnbull, and William Brown being jointly indicted for the crime of willful and malicious cutting and wounding her husband, Melvin Turnbull, she was by the verdict of the jury found guilty, and her punishment affixed at confinement in the penitentiary for the term of one year, and judgment against her was accordingly rendered.

She has appealed from that judgment, and complains of an error of the court below in permitting her husband to testify as a witness upon the trial against her.

It is not necessary that the error of the court in admitting incompetent testimony be relied upon in a motion for a new trial in order to enable the accused to avail herself of that error upon appeal. (Johnson v. Commonwealth, 9 Bush, 228.)

By section 24, chapter 37, title "Evidence," General Statutes, it is enacted "that neither husband nor wife shall be competent for a witness against each other, or concerning any communication made by one to the other during marriage, whether called while the relation subsists or afterwards," etc.

There is nothing to indicate that chapter 37 was intended by the legislature to apply exclusively to civil actions and proceedings, nor can section 24 by its terms be so confined in its application.

The court, therefore, in permitting her husband to testify against her erred to the prejudice of appellant, and the judgment of conviction must be reversed and the case remanded, with directions to grant her a new trial and for other proceedings consistent with this opinion.

W. Monfort for appellant.

P. W. Hardin for appellee.

SOUTH v. COMMONWEALTH.

(Filed October 6, 1881.)

1. Violation of local option law—A person may in the same indictment be charged with more than one violation of the local option law, but each offense should be separately charged, and the statement of the particular circumstances of each should be direct and certain.

The statement that the accused sold liquors "upon divers other days and times" describes no offense for which he may be tried.

2. A person is not guilty of violating the local option law when the sale is made by another, though done in his presence and at his solicitation, unless he be the owner of the liquor sold.

3. It is not necessary to allege in an indictment that the person charged with violating the local option law in a town where it is in force had no license to sell, for by the terms of the law no license to sell in such town can be granted.

Appeal from Grayson Circuit Court.

Opinion of the court by Chief Justice Lewis.

Under the indictment as found and presented the defendant can be legally convicted of only one offense. The statement that he sold liquors "upon divers other days and times" describes no offense for which he may be tried. It follows, therefore, that instruction No. 1 is erroneous so far as it authorizes the jury to find the accused guilty of more than one offense.

A person may in the same indictment be charged with more than one violation of the local option law, as it is called; but each offense should be separately charged, and the statement of the particular circumstances of each should be direct and certain.

Instruction No. 2 should not have been given. A person may be guilty of violating the local option law who sells for himself, or for another, or authorizes another to sell for him, but he is not guilty when the sale is made by another, though done in his presence and at his solicitation, unless he be the owner of the liquor sold.

It is not necessary to allege in an indictment that the person charged with violating the local option law, in a town where it is in force, had no license to sell, for by the terms of the law no license to sell in such town can be granted. The demurrer to the indictment was, therefore, properly overruled.

But for the errors mentioned the judgment of the court below is reversed and the cause remanded, with directions to set aside the verdict of the jury, grant a new trial, and for further proceedings consistent with this opinion.

J. P. Hobson for appellant.

P. W. Hardin for appellee.

ANDERSON, TRUSTEE, &c. v. STERRITT, &c.

(Filed October 8, 1881.)

1. An action for dower is an action for the recovery of real estate, and not a mere personal right or chose in action.

2. Limitation as to action for dower—The widow's right of action accrues upon the death of her husband, and where the husband's vendee claims and holds the land as his own, her right of action will be barred by the statute of limitation, in fifteen years.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

The appellee, Mrs. Sterritt, and her present husband filed this petition, asking to have dower assigned her in certain lots of ground in the city of Louisville. Her former husband, Thomas Low, was seized in his own right of this land in his lifetime and during the marriage, and conveyed the same by deed to Garvin, Bell & Co., the remote vendors of the appellants.

Mrs. Low, now Mrs. Sterritt, was under age at the date of the conveyance by her husband, nor was the deed, although acknowledged by her, recorded within the time prescribed by law so as to pass her contingent right of dower. She arrived at age in the year 1857, and became discoverd by the death of her husband in the year 1858.

The appellants relied as a defense on the statute of limitation, barring a recovery of real estate after the lapse of fifteen years from the accrual of cause of action. The statute reads: "An action for the recovery of real property can only be brought within fifteen years after the right to institute it first accrued to the plaintiff, or to the person through whom he claims." The chancellor below adjudged that this statute did not apply, as the claim asserted for dower was not an action to recover

real property, but the assertion of a mere right in the nature of a chose in action.

The appellants then relied on the statute of ten years, that provides: "An action for relief not provided for in this or some other chapter can only be commenced within ten years next after the cause of action accrued." It was considered below that this statute would apply if the appellants or those claiming under them had been in the actual, adverse possession of the lots of ground for the period mentioned in the statute, but that the constructive possession following the legal title could not be regarded as adverse to the claim of the appellee.

A party may acquire a title to real estate by adverse possession, but under either of the statutes relied on it is not necessary for the party holding the legal title, and against whom the claim is sought to be enforced, to show that he has had an actual possession under his claim of title for the period mentioned in the statute. It is true there must be some adverse claim to that of the plaintiff, for if not, there is nothing to prevent an entry on the land or assignment of the dower. The appellants and their vendors have been claiming to hold this land under the conveyance made by Garvin, Bell & Co. since the year 1856, and the appellee's disability was removed in the year 1858. She had then arrived at the age of twenty-one years, and was a feme sole. Her right to prosecute her claims, and to enter upon the land under the order of the chancellor, accrued at that time, and the statute expressly provides "that an action for the recovery of real property can only be brought within fifteen years after the right to institute it first accrued to the plaintiff."

If there was no claimant of the property, and the possession was with the widow by reason of her marital right, although not living on the property, an action would not be necessary; but here these parties were vested with the absolute title twenty-three or twenty-four years before the beginning of this action, and within the last five or six years made valuable improvements upon the property. Their claim was, during all this time, hostile to that of the widow, and her right to institute this character of action first accrued in the year 1858.

If one is invested with the fee simple title to land the possession is necessarily with the title unless there is an adverse holding, and no cause of action arises in favor of the owner until an entry is made under a claim of right, and then he may maintain his ejectment. The statute commences to run when the entry is made, and no right of action exists until then. If A has vacant land, and there is no hostile possession, he can not sue to recover it, because there is no one to sue or wrong to complain of; but the moment there is an entry, with a claim of right hostile to the owner, the cause of action arises. This is the effect of the statute of limitation as between the real owner and one who acquires an actual, adverse possession.

This rule does not apply to the case at bar. The wife, at the time the appellants acquired the title, had neither title, possession, nor the right of entry, but a mere contingent right she might enforce in the event she survives her husband. Her husband, who was invested with the legal title, and had either the constructive or actual possession, conveyed the absolute estate to the vendors of these appellants. They have held and claimed under that conveyance for twenty-three years or longer, and the widow is now asserting a claim to this land, with a cause of action that originated more than twenty years before it was instituted.

She is certainly barred from any recovery, not by reason of the ten years' statute, but by reason of the fifteen years' statute applicable to the recovery of real estate. It is true that, at common law, and before the adoption of the Revised and General Statutes, there was no limitation to the assertion of a claim for dower; yet courts of equity fixed the period at twenty years, and barred a recovery after such a lapse of time. By our statute "the words real estate or land shall be construed to mean lands, tenements or hereditaments, and all rights, titles and interests therein, more than a chattel interest," etc. (General Statutes, chapter 21, section 18.)

The claim to dower is not the assertion of a mere personal right or a chose in action; it is a right to real estate. (2 Scribner on Dower, page 33, section 21.) The widow claims that she is entitled to have assigned her one-third in interest

of this real estate during her life. When assigned to her she has an estate of freehold, and it is difficult to arrive at any other conclusion than that the recovery, if successful, is of real estate, and not a mere chattel interest. In the case of *Kinsolving v. Pierce*, 18 B. Monroe, —, this court said: "A purchaser from the husband by express contract may purchase subject to the wife's claim for dower, and that in such a case his holding would be presumed to be consistent with his purchase," etc. But when, as in the case then being decided, the purchaser derives the right, and claims and holds the land as his own, his possession is not only adverse to the vendor, but to all claiming under him. The widow's right of action accrues upon the death of her husband, and unless the possession be expressly held subject to her claim by the vendee, her right of action will be barred by the statute of limitation. This case shows that since the adoption of the statutes this court has regarded the statute of limitation as affecting the claim for dower like other actions for real estate, and it is manifest that with the absolute title acquired from the husband, no actual possession is necessary to bar the wife's claim for dower.

The purchaser from the husband held and acquired the same possession that the husband of appellee had, and for a wrongful entry on this land after the purchase their vendees could have maintained their ejectment, and when the widow attempts to enter or calls on the chancellor to disturb their title by assigning her dower, they may interpose the fifteen years' statute, if that time has elapsed since the disability of the appellee was removed, for then her cause of action accrued.

The judgment below is reversed and cause remanded for further proceedings consistent with this opinion.

Alex. P. Humphrey, Bullock & Anderson and Byron Bacon for appellants.

C. B. Seymour, J. H. Seabell and S. S. Kohn for appellees.

FRANKLIN, &c., EX PARTE ON PETITION.

(Filed October 8, 1881.)

Right of married woman to act as feme sole should have been granted, in this case, where she has shown that she is the owner of certain property; that she has capacity to manage it; that the husband is insolvent, and that the husband's creditors will not be injured.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Hargis.

Elizabeth Franklin and her husband filed a joint petition praying the circuit court to empower her to use, enjoy, sell and convey her property for her own benefit, make contracts, trade in her own name, sue and be sued as a single woman, and dispose of her property by deed or will.

It is alleged and proven that she owns seventy-two acres of land, willed to her by her grandfather, and twenty other acres which she purchased, and some personal property, and that her husband is insolvent. The witnesses state that she is well qualified to exercise the power which she seeks to have conferred upon her, and that they do not believe his creditors will be hindered or injured by the grant thereof.

The appellants' petition was dismissed and they have appealed.

We do not think the case of *Moran v. Moran*, 12 Bush, 302, sustains the judgment. In that case the insolvency of the husband was the only ground upon which the application was made, and in closing the opinion, the fact that the feme had no property, trade or calling enabling her to earn money was so emphasized as to indicate, had she possessed either, that would have been sufficient.

But it was not shown how the grant of such power could benefit or protect Mrs. Moran, and she was, therefore, properly denied the power which was idly sought, or might, if granted, have been perverted to the injury of her husband's creditors.

The purpose of the statute was to deny such applications and avoid such results, and to provide a mode of protecting the property or acquisitions of the wife against the claim or debts of her husband.

But before she can successfully demand the power it must appear that she either has property, or a trade, calling, employment, or business by which she can acquire property that calls for the protection under which she may enjoy the benefits of the one and the fruits of the other.

The appellant has furnished satisfactory evidence of her ownership of the property named, and of her capacity to manage it. And there is no evidence whatever that the application is made upon the part of either to cheat, hinder, delay or injure his creditors.

But it is suggested that to grant her the power will have that effect. How such a result can follow we are unable to comprehend, for no creditor of his can either legally or equitably reach her real estate or its rents, and appropriate them to the payment of his debts, unless the rents and profits of her lands were so increased by his labor or means as to exceed the necessities or comfort of the family; and in that case the excess which is traceable to his labor or means could be subjected to his debts after as well as before she is empowered to trade, etc., as an unmarried woman.

And we do not agree with the construction that the statute was enacted only for the benefit of certain classes of married women, and not for the wives of farmers. The law is applicable to all women alike.

Wherefore, the judgment is reversed and cause remanded for judgment in conformity to this opinion.

C. F. & A. R. Burnam for appellants.

MAGRUDER'S ADM'R v. SMITH.

(Filed October 11, 1881.)

1. Personal representative of widow can recover rents arising from her dower estate, for not exceeding five years before action, against the heirs or devisee or his alienee, but only from the commencement of action against a purchaser from the husband.

2. It is not necessary to unite the action for rent with the action for dower, and although suit may never have been instituted by widow entitled to dower for the rents due, her right of action descends to her personal representative, and he may recover the rents.

Appeal from Jefferson Circuit Court.

Opinion of the court by Judge Pryor.

The husband of Mrs. Magruder, in his lifetime and during the marriage, conveyed a tract of land, of which he was then seized, to one Fetter, and by subsequent conveyances the appellee Smith became the owner.

The widow, shortly after the death of her husband in December, 1867, brought this action against the appellee Smith in the Louisville Chancery Court, asking that her dower be assigned her, but made no claim in that action for rent. The claim was resisted by the appellee, and in October, 1868, the chancellor made an interlocutory order in which she was adjudged entitled to dower, and appointing commissioners to allot it.

A report was made of the allotment shortly thereafter, but was never confirmed, and in 1876 Mrs. Magruder died, and her death terminated her right to dower.

The present appellant having qualified as her administrator, instituted the present action, in which the facts herein stated were specifically alleged, as well as her right at the institution of the action to dower in the land, and sought to recover from the vendee in personam, the appellee, against whom the action was instituted, the value of the rents of her dower interest from the institution of the action in 1867 until her death in 1876.

The present action was instituted in November, 1877. The court below dismissed the petition, and the sole question presented here is: Is the personal representative of the widow entitled to recover the rents?

Under the statute of 1793 the widow, after the recovery of dower, was entitled, as against the party convicted withholding it, damages, "that it to say, the value of the whole dower to them belonging from the time of the death of their husbands." This statute applies alone to land of which the husband was seized, and not to land sold and conveyed by the husband prior to his death. In such cause neither a court of law nor equity could demand damages or afford the widow any relief for the detention of her dower. (*Kendall v. Honey*, 5 Monroe, 282.)

The Revised and General Statutes have changed the common law rule as well as the statute of 1796 in regard to the claim

of dower, and now the widow is entitled "to one-third of the rents of her husband's dowable real estate from his death until dower is assigned." (Chapter 51, section 8, General Statutes.) This section applies to land of which the husband died seized, or to his dowable real estate. Section 9 of the same chapter provides: "Whether the recovery is against the heir or devisee or purchaser from the husband, the wife shall be endowed according to the value of the estate when received by the heir, devisee or purchaser, so as not to include in the estimated value any permanent improvements he has made on the land. Against the heir or devisee or his alienee her claim for rent shall not exceed five years before action, and against the purchaser from the husband, shall only be from commencement of action. In either case it shall continue up to the final recovery. If after action brought the widow or tenant dies before recovery, the rent may be recovered by her representative, and against his heirs, devisees and representatives."

The heir or devisee, or the alienee of either, who takes possession of the dowable real estate at the death of the husband, are made liable for the rent five years prior to the institution of the action for dower. They are not entitled to the exclusive use as against the widow, but as to the purchase from the husband during his lifetime, he is not only in the possession rightfully, but is entitled to the exclusive use and possession until the death of the husband, and until the assertion by the wife, by action, of her claim for dower. Therefore, the distinction made as to the liability for rent, the heir, devisee, or alienee for them being liable for the rent for five years prior to the institution of the action for dower, and the purchaser from the husband for rent only from the time the action was instituted. The recovery alluded to is the recovery of her dower interest, for, as against the purchaser, she is not entitled to rent until she asks that dower be assigned, and this must be done by action so as to entitle her to rent. Such an action notifies the tenant or purchaser in possession of the interest of her claim, and if he resists the recovery he is liable for damages in the way of rent. It is not necessary there should be a recovery to entitle the widow to rent, but there must be an assertion of her right by action before she can recover it.

The statute expressly provides: "If, after action brought, the widow or tenant died before recovery, the rent may be recovered by her representative, and against his heirs, devisees and representative." This recovery is her dowerable interest, and the plain meaning of the statute is that if she has instituted her action for dower, and dies before recovery, her representative may recover rent. This right is given from the fact that if an action is instituted to recover dower, and the right of recovery exists, all the incidents to the claim follow the action. It is not required by the statute that the claim for rent shall be embraced in the action for dower. The widow's right to rent arises from the demand by an action for the recovery of her dower, and although incidental to dower, the rent may be recovered in an independent proceeding.

As in ejectment after recovery an action for mere profits may be maintained by a separate suit, and under our system of pleading it may be conferred in the original action for the land, or by a separate action; so of rent, the widow may claim it in her original petition, or by an independent action, but must have sued to recover her dower before she is entitled to recover rent, and the fact of her death terminating her action for dower does not preclude her representative from recovering the rent, as the claim for rent in such a case passes by reason of the statute to him. (*Burr, McGrew & Co. v. Woodrow*, 1 Bush, 603.)

The widow could have filed an amended petition at any time asserting her claim for rent, or if she had prosecuted the action to final recovery she might have instituted an independent action in order to recover rent. If the right to recover rent was with the widow when she instituted her action for dower, this right has never been lost, and passed to her personal representative.

The cases relied on by counsel for the appellee (some of them) are founded on statutes similar to the act of 1796, making the right of the widow to recover damages depend on the recovery of dower. The case of *Hill v. Golden*, 16 B. M., —, seems to have been considered without reference to the Revised Statutes, as it is there adjudged that the widow is not entitled

to recover rents against a purchaser even from the beginning of her action. In the case of *Yancy v. Smith*, 2 Met., —, this court, in passing on the question under the Revised Statutes, adjudged that the widow is entitled to rents against the purchaser from her husband from the time she commences her action, and it is manifest that the case of *Hill v. Golden* was determined without the attention of the court having been called to the action of the Revised Statutes, fixing the time at which the right to rent began. The sections in the Revised and General Statutes are almost identical, the word suit being used in the Revised Statutes where the word action is found in the General Statutes. Neither statute provides the manner in which the action for rent shall be brought, and it seems to us the principal question is, was the widow entitled to rent? If so, the right under the statute passed to her personal representative.

Her right to rent is unquestioned, and she has not waived that right by anything appearing in the record. The long pendency of the action is attributable, as is alleged in the reply, to the effort on the part of the parties litigant to compromise the claim, and this, if a shorter delay than the period of limitation could be regarded as an abandonment of the action, is a sufficient cause for not prosecuting it with proper diligence. The right to dower in the widow being established, and she having instituted an action to recover it, the right to rent can not be denied.

Judgment reversed and cause remanded for further proceedings consistent with this opinion.

J. F. Bullitt and B. F. Camp for appellants.

Rodman & Brown for appellee.

RUDD v. MATTHEWS.

(Filed October 13, 1881.)

1. Estoppel by admissions or representations—Admissions or representations made with the intention, or reasonably calculated, to influence the conduct of another, estop the person making them from denying their truth when they have been acted upon.

It is not necessary to create the estoppel that the admissions or representations were made with a fraudulent intent.

2. Having admitted that his signature was genuine, and that he was bound thereby as surety, the party making such admissions in this case will not be permitted to deny his liability, although the jury found that he neither signed the note nor authorized any one to sign it for him.

Appeal from Union Court of Common Pleas.

Opinion of the court by Judge Pryor.

This appeal is from a judgment rendered in the Union Court of Common Pleas, in an action by the appellee against the appellant and others on a note for \$526. The note is payable to the appellee, and was executed by A. G. Robinson as principal, and purports to have been executed by the appellee, Rudd, and his co-obligors as the sureties. Robinson, the principal, died in February, 1879.

The note was dated on the 28th of May, 1878, and made payable in twelve months thereafter, and this action was instituted upon it in about twelve months after its maturity. The defense relied on by the sureties was the plea of non est factum, and the appellee, to avoid that defense, pleaded an estoppel as to the defendant, Rudd, in substance as follows: He alleged that after the execution of the note, and while Robinson, the principal, was living, and with ample property subject to execution to have satisfied the debt, the defendant, Rudd, told the plaintiff he had signed the note and would remain bound until it was discharged; that, relying on these admissions and the promise of the defendant, he failed to take any legal proceedings in order to make his debt out of the principal; that other creditors in the meantime collected, by legal proceedings, about that time and shortly after, several thousand dollars on their claims out of the property of his principal, and that his debt could, or would, have been made or secured but for the representations and statements made by the appellant that his signature to the note was genuine.

There is no direct averment that in the admission it was the purpose or intention of the appellant to mislead the appellee, or that the latter should act on the statement made, still the appellant in his rejoinder avers that the statement was not made with the intention or purpose of inducing the plaintiff to forbear to sue or to treat the note as not due; that he intended no wrong or fraud on plaintiff.

To that rejoinder the appellee says that the defendant acknowledged his signature to be genuine and promised to pay the note, and thereby the plaintiff was lulled into security, and caused him to forbear to resort to legal remedies for the collection of his debt, etc.

There was no demurrer to any of these pleadings, and we think the issue was properly presented when considering the entire pleadings filed by each party.

The testimony conduces to show that Robinson had been using the names of his friends on his paper without any authority, and that the appellant called on the appellee to know what had become of a \$1,000 note he held on Robinson, and for which he was bound as surety, and was told by the appellee that the note had been paid. He was at the same time informed by the appellee that he had this note in controversy on Robinson for which he was bound as surety, and appellant responded that it was all right, and it seems, in a short time after this, at his instance, the note was handed to him for inspection, and he said it was his signature, and proposed to make some arrangement to pay it. His recognition of his liability is also shown to have been admitted by him in various ways.

It seems that Robinson had signed appellant's name as surety to certain county bonds without any authority, and when examining these bonds he pronounced them forgeries, and said the only note he was on as surety was a note to the appellee for \$550 or \$560. The proof of the admissions and representations made by the appellant, as shown by the testimony of the appellee, is corroborated by appellant's own testimony. He says he did admit he signed that note, but that he was often in such a condition, when under the influence of liquor, as to prevent him from comprehending the nature of business transactions, and when he made the admission he had reference to some other note for a smaller amount for which he was liable.

The appellant is an illiterate man, and can only write his name. His clerk in a drug store owned by appellant testifies that the signature of appellant is not genuine, and the same statement is made by others familiar with his signature. The

decided weight of the testimony as to the signature is that it is not genuine.

The jury made various special findings in response to interrogatories propounded by the court at the instance of counsel, and also returned into court a general verdict for the appellee.

The special finding for the plaintiff (appellee) was: "We, of the jury, find that the defendant, in interviews with the plaintiff before the maturity of the note sued on, was informed by plaintiff of the amount of the note, and about the time of its date, and that his (defendant's) name was to said note as the surety of Robinson, and that the defendant admitted his signature thereto was genuine, and agreed to pay it or see it paid, and the defendant relied on the promise and admission as true, and forbore to take action against Robinson, whereby he could have made or secured said note had defendant disclaimed his liability thereon." The special findings for the defendant were:

1st. That he did not sign the note or authorize any one to sign it for him.

2d. That defendant made said admissions and promise in ignorance of the fact that his name on the paper was not his genuine signature.

The defendant entered his motion for a judgment on the special findings, and the motion was awarded.

The only question presented in this record necessary to be considered arises in the special finding, to the effect that when the admissions were made the appellant was mistaken as to the genuineness of the signature and his liability for the debt. It is insisted by counsel for the appellant that the rule is:

"1st. The person sought to be estopped has made an admission or done an act with the intention of influencing the conduct of another, or that he had reason to believe would influence his conduct in connection with the title he proposes to set up.

"2d. That the other party has acted upon, or been influenced by, such act or declaration that the party will be prejudiced by allowing the truth of the admission to be disproved."

These rules are recognized in the elementary books, and we see no reason for denying their application in a case like this.

That the appellant, when he made the admissions as to his signature, had reason to believe that it would influence the conduct of the appellant is evident, and that he made the admission for the purpose and with the intention of quieting his apprehensions as to the security for his debt is equally certain, and being satisfied with his security, as the jury find and as the evidence conduces strongly to show, made no effort to collect his debt of Robinson, whilst other creditors were proceeding to realize by legal process the payment in full of their demands.

In this case the note was signed when delivered by the principal obligor to the appellee, and, relying on the integrity of the former, he accepted the note and loaned his money. When the liability of the surety was questioned, his only mode of ascertaining the fact upon which he could rely was to see the surety, and when informed by him that his signature was genuine he had the right to look to him for payment, and when uniting as to the truth of the admissions and promises made he has indulged the principal, or failed to take coercive measures to collect his debt when it could have been made, the surety should be denied the right to disprove the truth of his own statements so as to avoid liability. The representation was made that it might be acted upon, and to assure the plaintiff at least that his note was genuine.

It is certain from the proof in the cause and the finding of the jury that the appellee acted on the representations and admissions made by the appellant, and that this action, influenced by the conduct of the appellant, caused him to lose his debt. In the case of *Casco Bank v. Keen*, 53 Me., —, it was adjudged that one who adopts a signature knowing it to be forged, is estopped from denying its genuineness. In the case of *Heffern v. Darnim*, 63 Illinois, —, the proof showed that the surety by his admissions and declarations, "the note was all right, and if the plaintiff would hold still he would pay him," authorized the conclusion that the surety designedly induced the plaintiff to omit to take measures to collect the same from the other maker when he was solvent.

In the case of *Forsythe v. Banta*, 5 Bush. —, this court went so far as to say that a mere ratification of an unauthorized sign-

ing of a party's name to a note as joint obligor works an estoppel. While the mere ratification of a void contract may be regarded as without any consideration, and the soundness of the rule laid down in *Forsythe v. Banta* properly questioned, still in the case before us there is not only a ratification but an express admission that the signature to the note was that of the surety. Under our present statute the authority to sign the name of one to a note as surety must be in writing, and in *Moxley v. Ragan* this court held that proof of a promise to pay by the surety, when the note was signed without authority, would lead to the same evil that the statute was intended to remedy, and, therefore, held the testimony incompetent, and the promise not obligatory. In that case, if the party had admitted his signature was his own, the question would have been entirely different.

It is argued here that the proof of the many recognitions by appellant of his liability and the genuineness of his signature indicates a persistent effort to entrap appellant, so as to fix upon him a liability as surety. This might be but for the special finding and the testimony of the appellant himself. He says: "He recollects to have had the note in his hands and looked at it, and perhaps had other conversations when the note was not exhibited, and in some of the conversations might have told plaintiff his name was on the note and the signature was his—that he had signed it or put it there—and the note was as good as the bank."

He further says he thinks the note was for \$250. It was proven by the appellant on the trial and a number of witnesses that it was not his signature, and why he did not know that fact when the note was presented to him, and when he was investigating the forgeries committed by Robinson, is left unexplained, unless he was too much intoxicated at each conversation to know the effect of his conduct and admissions. It is argued, however, that the jury by their special finding have determined that when he admitted the signing of the note he did so under a mistake as to his own signature, and if acting in good faith, as the special finding establishes, he is not liable.

Ordinarily there must be a purpose or intention to deceive or mislead so as to work an estoppel. "It is not necessary, in order to create an equitable estoppel, that the party should design to mislead—it is sufficient if the act was calculated to mislead, and actually has misled, a person acting upon it in good faith, and who exercised reasonable care and diligence under all the circumstances, and effectually estops the party from averring a state of facts different from what the party acted upon." (Herman on Estoppel, page 418.) "It seems to be evident that a party's ignorance of the truth of the representation made will not remove the estoppel if he was found to know the fact, or if his ignorance is the result of his gross negligence." (Bigelow on Estoppel, 476.)

Now the appellant is presumed to know his own signature, and the holder of that note, when put upon inquiry as to its validity, and in the exercise of the utmost diligence, has gone to the party, and the only party, whom he had the right to suppose that could speak the truth as to the existence of the fact he was endeavoring to ascertain: he saw the appellant and was informed by him that the signature was genuine, but, as the jury have found, induced him to forbear to sue and to rest quietly as to the appellant's liability. Now, after such acts and admission, is not the appellant in good common law and morals estopped to plead non est factum to the paper? We think he is. Parke, B., says, in discussing this question, "and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant he should act upon it, and did act upon it as here, the party making the representation should be equally precluded contesting its truth." (Bigelow on Estoppel, note 1, page 487.)

The party must mean his representation to be acted upon, and when it is acted upon, as in this case, and works an injury, the party making the admission is estopped to deny the truth of his own statement. The facts of this case show that appellee was influenced to rely on the ability of the appellant to pay, and that his forbearance to sue the principal was caused by the admissions made; that appellant purposely caused the

appellee to look to him for payment, upon promises made to pay the debt, and his acknowledgment time and again that his signature was genuine.

Judgment affirmed.

Wm. Lindsay and Spalding & Spalding for appellant.

D. H. Hughes and S. B. Vance for appellee.

FITZPATRICK v. TODD, &c.

(Filed October 15, 1881.)

Supersedeas bond, executed by personal representative, binds him "to pay the damages and costs of the appeal and the judgment in case of affirmance out of the assets which have or may come to his hands in due course of administration."

But such a bond does not bind the personal representative or his sureties personally, except as against assets which are in or may come to his hands.

Appeal from Floyd Circuit Court.

Opinion of the court by Judge Hargis.

The appellant, W. H. Fitzpatrick, as executor of Burwell Vaughan, Jr., deceased, appealed from a judgment against himself in his fiduciary capacity to the Court of Appeals, and executed a supersedeas bond with his co-appellant as surety.

The style of the case at the head of the bond describes the principal as "executor of the estate of Burwell Vaughan, Jr., deceased. appellant."

He is mentioned in the body of the bond as "appellant" and "Wm. H. Fitzpatrick, appellant," and the covenants are that the "appellant" will pay all costs, damages, etc., and satisfy and perform the judgment in case of affirmance.

He signed the bond with these words: "Ex'or of B. Vaughan, dec'd," attached to his name.

The original judgment from which he prosecuted the appeal, in the first place directed the amount of it to be levied of assets, and the executions thereon and for the 10 per cent. damages awarded on the affirmance which was had were issued against him as executor to be levied of assets.

The appellees brought their suit upon the supersedeas bond named against the appellants, alleging nonpayment of the judgment and damages, but failing to aver that the executor had in his hands assets of his intestate's estate in any amount.

at the time the supersedeas bond was executed, or that any assets had since come to his hands, and that he had wasted them, or that he had neglected to perform his duty in appropriating the assets of the estate to the payment of debts, or in collecting assets for that purpose, or that any assets existed. In short, no breach is assigned except nonpayment.

The appellants moved to dismiss the suit for want of an affidavit and demand of the executor, and the court properly overruled the motion.

No answer being filed on the call of the cause the petition was taken for confessed, but during the same term an affidavit excusing the failure to answer, accompanied by an answer, were offered to be filed. The court rejected them, and rendered judgment against appellants individually.

They have appealed.

In the case of Mahan, &c. v. Tydings, &c., 10 B. M., —, this court held that an injunction bond "should be adapted to the nature of the case and bind the executor and his surety, in case the injunction should be found wrongful and be dissolved, etc., to pay the judgment, etc., out of assets in the due course of administration, to the extent that the same might be properly applied thereto. * * * Such a bond binding the executor and his surety personally, so far as the debt enjoined is concerned, for the due administration of the assets from the date of the bond, and securing the creditor from loss by subsequent maladministration to his prejudice is all the security can justly demand from the law, which authorizes the suspension of his remedy, and is all * * * that the statute * * * intended to require or authorize."

The doctrine of that case was recognized in Nelson v. Tyler 11 B. M., 141, in which it was held that although the obligation to pay the penalty of an appeal bond was personal on the obligors, who were an administrator and his surety, they were not individually bound beyond the assets in the hands of the administrator, except for costs, which the act of 1812 authorized, but now, by section 17, chapter 26, General Statutes, the personal representative in any action is exempted from judgment for costs except against the assets which have, or may, come to his hands.

The bond sued on, in reciting the appellant's obligation, literally follows the language of section 748, Civil Code, specifying the terms of a supersedeas bond, but does it follow that this obligation is to be discharged by personal representatives individually? If so, no personal representative could rid himself of an erroneous judgment, to be alone levied of assets, without the risk of personal responsibility as the penalty of failure to succeed upon an appeal.

No such obstruction or danger should attend the honest effort of a personal representative to relieve the estate from a judgment that a reasonable man, acting under such advice as personal representatives are entitled to, would consider erroneous and unjust to the estate which he represents. And the obligation of a supersedeas bond, when executed by a personal representative, must be treated as binding him to pay the damages and costs of the appeal and the judgment, in case of affirmance, out of the assets which have, or may, come to his hands in due course of administration.

This construction of the bond is reasonable, because it does not deprive or suspend the rights of the appellees upon the original judgment to any greater extent than the bond fully secures, nor against any property which the bond thus construes does not preserve to them.

Wherefore, the judgment is reversed and cause remanded for further proceedings not inconsistent with the principles of this opinion.

A. Duvall for appellant.

Hampton & Hagar for appellees.

SANDERS, &c. v. MILLER, &c.

(Filed October 15, 1881.)

Antenuptial contract in writing, and settlement upon the wife in pursuance thereof, is sustained in this case against the claims of creditors. Held — "If a husband voluntarily enters into a contract to make, or do or make, a settlement upon his wife in discharge of an obligation arising out of the reception of her property, under an agreement made before its receipt or reduction to possession, such as the chancellor would on her application make on her, neither the contract nor the settlement would be regarded as fraudulent against creditors."

November, 1881—3

Appeal from Shelby Circuit Court.

Opinion of the court by Judge Hargis.

This case involves the validity of a settlement made in pursuance of a written antenuptial contract executed by the appellants on the 8th of February, 1878, in this language:

"An article of agreement entered into between J. B. Sanders, of the first part, and Orra A. Davis, of the second part. The said James B. Sanders agrees to give Orra A. Davis (provided she marries him) as good a house, to have and to hold forever, as her sister Helen M. Stout had, or a sum of money equivalent to the same, \$5,000."

Not long after this writing was made they intermarried.

At that time he owned a farm and one horse and buggy, and was indebted in the sum of about \$750 as principal, and near \$5,000 as surety, and she owned forty-two acres of land worth \$1,000, a horse, and had \$600 loaned out."

He sold his land on the 15th of July, 1878, for the sum of \$8,556.55, but before doing so he obtained his wife's relinquishment of her contingent right of dower by executing and delivering to her a paper reciting the substance and purpose of the antenuptial contract, and agreeing to pay to her \$5,000 as soon as he should collect "the money" for which he sold his farm.

This paper would be of little weight in the absence of the antenuptial contract because of the ease and security with which it might have been fabricated; but in view of all the facts of this case it is freed from suspicion and based upon a valuable consideration.

She was not bound or compelled to relinquish her dower right, and would doubtless have refused to do so had her husband declined to give her a written assurance of his good faith and purpose to execute the marriage settlement which he had agreed to make upon her as a part of the marriage contract, but had not done so.

Her relinquishment was a valuable consideration (*Hall v. Plummer*, 6 Ind., 121), and that fact should be given its full weight in view of the antenuptial agreement.

While contracts made between husband and wife as a general rule are void, still if a husband voluntarily enter into a contract to make, or does make, a settlement upon his wife in discharge of an obligation arising out of the reception of her property, under an agreement made before its receipt or reduction to possession, such as the chancellor would, on her application, make upon her, neither the contract nor the settlement would be regarded as fraudulent against creditors. And with much greater reason it can be said that such a contract is possessed of vital force when preceded by a bona fide antenuptial contract, and supported by a valuable consideration (relinquishment of dower), moving from her to him at the instant of its execution. (*Latimer v. Glenn*, 2 Bush, —; *Campbell v. Campbell's Trustee*, MSS. Op., 1881; *Miller v. Edwards*, 7 Bush, 397; *Lyne, &c. v. Bank of Kentucky*, 5 J. J. M., 550.)

But passing from the meritorious character of the second writing and adverting to the antenuptial contract, we find upon both law and fact ample authority in its support.

The case of *Magniac, &c. v. Thompson*, 7 Peters, 393, cited by appellants' counsel, contains the doctrine of the text-books and decided cases in this country and England upon the issue involveed in this case. We cite the following extracts from it with hearty approval as stating with perspicuity the rule and its reasons:

"Nothing can be clearer, both upon principle and authority, than the doctrine that to make an antenuptial settlement void as a fraud upon creditors it is necessary that both parties should concur in, or have cognizance of, the intended fraud.

"If the settler alone intended a fraud, and the other party have no notice of it, but is innocent of it, she is not and can not be affected by it.

"Marriage, in contemplation of law, is not only a valuable consideration to support such a settlement, but is a consideration of the highest value; and from motives of the soundest policy is upheld with a steady resolution. The husband and wife, parties to such a contract, are, therefore, deemed in the highest sense purchasers for a valuable consideration."

As that case grew out of a marriage settlement actually made before marriage, and in the case before us the settlement was not consummated until after marriage, it is not in that particular a complete authority here. But in the case of *Browning's Adm'rs v. Coppage, 3 Bibb*, —, this court held that a contract between husband and wife made before marriage, but not to be operative until after coverture ceased, was not extinguished by the intermarriage under the rule that in general the contracts made between husband and wife, when single, became void by their marriage. And this exception to the general rule is based upon the valuable consideration furnished by her to uphold the contract; and in that case the consideration was her agreement that he should enjoy all of her estate during his life, although she might die without issue. (2 Bibb, 408.)

And in a more recent case (*Kinnard, &c. v. Daniel, &c.*, 15 B. M., 500), valuable and meritorious considerations moving from the wife were given their full force in support of settlements made after marriage in pursuance of an antenuptial agreement.

Roper on Property, volume 1, page 308, cited in the case above, says that "settlements made after, but in pursuance of written articles entered into or letters written before the marriage," are "unimpeachable by any persons, whether they be creditors or subsequent purchasers, for the contract of marriage is a valuable consideration, and establishes the settlement against every one."

Having mentioned the law upon antenuptial contracts to make settlements executed both before and after the marriage for the purpose of giving each of the writings executed by Sanders to his wife its due force, and to point with certainty to the issue of fact in this case, we find that an action was brought by each of the appellees, after procuring a return of no property upon executions which emanated from judgments at law rendered in their behalf, against the appellant husband for debts that he had created as surety, in which they substantially allege that he had fraudulently caused a deed to be made to his wife to a tract of land he had purchased subsequent to the sale of the land owned by him at the time of the marriage,

for the purpose of cheating and delaying his creditors, and that she participated in his fraudulent intent.

The answer of the appellants denies the material allegations of fraud, and they rely on a settlement upon the wife made in execution of the antenuptial contract.

Was the settlement fraudulent in fact?

It appears that out of the sum for which he sold his land he paid to her in part performance of the marriage contract \$3,-955, and disposed of the residue of the \$8,256.55 by paying \$5,000 of it to his creditors, and retaining or consuming the balance in support of himself and wife.

On the 31st of December, 1878, he, as her agent, bought the land sought to be subjected by appellees to their debts, and had it deeded to her.

The price agreed to be paid for the land was \$4,459.90, all of which she paid with the money obtained from him, and a portion of her property that she owned when they married.

Her deed was duly acknowledged and recorded, and before appellees instituted this action to set aside the conveyance she had expended the remainder of her property and money, and a part of \$1,500 she had borrowed, in erecting houses and other improvements upon what she had the right to suppose was her own land.

At the time the marriage agreement and deed to her were executed the evidence tends strongly to prove that she knew nothing of the amount or character of his indebtedness, except the information given to her by him to the effect that he owed a small amount for his sons and sons-in-law, which he did not expect to have to pay, and about \$750 for debts created by himself.

The evidence, if to be believed, and it is not impeached or attempted to be discredited in any way except by their condition and the character of the transaction, and we see nothing in the first to justify such a violent inference, and the last is upheld by sound policy and a highly meritorious and very valuable consideration, shows that she stands as fair as any other purchaser for value. And it never has been held that the mere fact that an assignment, sale of property, or payment of money in discharge of an obligation to a bona fide purchaser or cred

itor operates as a preference of one creditor over another, is sufficient at common law to invalidate it, unless it be for a consideration so inadequate as to prove the perpetration of an actual fraud upon creditors, which is participated in by both or all the parties to the transaction.

It is true if one were guilty of fraud, in so far as it could be reached without injury to another who was innocent, it would be the duty of the court to render relief, but as we have seen, in a case like this, the wife must also participate in or have knowledge of its perpetration.

She maintains her innocence by her sworn evidence, and having invested nearly all she possessed in the land for which she relinquished her dower in a much more valuable tract, and performed with fidelity the antenuptial contract, we are unwilling to disturb her in the enjoyment of a home prepared by her industry, and lawfully anticipated by her marriage agreement.

Wherefore, the judgment is reversed and cause remanded for judgment in conformity to this opinion.

L. A. Weakley and Wm. Lindsay for appellants.

Caldwell & Harwood for appellees.

GRAVES v. McGUIRE, HELM & CO.

(Filed October 20, 1881.)

1. The promise of a bankrupt, after filing his petition but before obtaining a discharge in bankruptcy, to pay a note, being without consideration, can not be made the foundation of an action.

2. A new promise to pay a debt already existing can not be made the foundation of an action.

Appeal from Jefferson Common Pleas Court.

Opinion of the court by Judge Pryor.

There is no distinction in the case before us and that of Ogden v. Redd, 13 Bush, —. The appellant in this case, after filing his petition and before he obtained his discharge in bankruptcy, promised to pay the debt due the appellees.

After his discharge the appellant, by reason of certain transactions between himself and the appellees, asserted a claim for a balance due him on settlement.

Appellees admit the balance, but say they have applied it to the debt the appellant owed them prior to his discharge in bankruptcy, alleging that the appellant, after filing his petition, promised to pay the debt; that this promise was accepted by them in lieu of the original understanding, and relying upon it they did not file their claim before the assignee in bankruptcy. They pleaded the same as a set-off, and obtained judgment for over \$464. An issue was properly found, and the jury returned into court special findings to the effect:

1st. That plaintiff did promise in March, 1878, to pay the defendants the balance he owed them.

2d. That the defendants accepted said promise.

3d. That plaintiff had notice or knowledge of such acceptance.

On these findings the judgment was rendered for the defendants. The inquiry at once arises, in what manner did these appellees adopt the promise made, and how did the appellant have notice of their acceptance?

The testimony of one of the appellees is that he accepted that proposition or promise in his own mind, but at no time communicated that fact to the appellant, and the only evidence the jury had as to the knowledge of the appellant in regard to this acceptance of the new promise was the promise itself, and if such knowledge had even been established, we are of the opinion that it did not create a new obligation.

It is nothing more than a promise to pay a debt already owing and collectible by law, and a renewal addressed to the creditor, without any additional conditions, that the debt will be paid. The original conditions remained in full force and had never been discharged, and as long as the creditors can maintain an action on the original promise a new promise, without some additional condition, will not affect an action.

That is the rule laid down in *Ogden v. Redd*, as well as by all the elementary authorities.

Suppose the appellees had sued the appellant on the original undertaking, and the latter, instead of relying on his discharge

in bankruptcy, had pleaded, by way of accord and satisfaction, that he had subsequently to the original promise, say on the — day of March, 1878, made an additional promise to pay the debt and it was accepted by the defendants, and, therefore, the last promise, and not the original undertaking, created the liability, can it be successfully maintained that such a plea would be good? We think not.

There must be some distinct agreement, based upon a consideration in which the original contract is merged or discharged, before even a promise can be made available, except for the purpose of defeating a plea of limitation. Where the debt is barred by time or by the bankrupt's discharge, and is no longer collectible by law, a new promise, based on the moral obligation to pay, creates a liability, but so long as the original contract can be enforced a mere promise or acceptance of the liability will not support the action.

In the case of *Ogden v. Redd* it is stated "it is not alleged or claimed that the promise on the latter was accepted in satisfaction of the note, and consequently it does not discharge the appellee from the obligation created by it." This counsel seem to have relied on in the court below, but when following the opinion, and in the next sentence, it is said "that the new promise, without an additional consideration, will not support an action, otherwise the debtor would be exposed to two actions."

In the case of *Trueman v. Fenton* the question was whether a bankrupt may not, in consideration of a debt due before bankruptcy, and after a commission in bankruptcy sued out, and for which the creditor agrees to accept no dividend or benefit under the commission, make new promise in whole or part satisfaction for the debt by a new undertaking. In that case the creditor gave up the execution he had for his debt, and accepted the note of the bankrupt for a little more than half the amount due in full satisfaction of his whole demand. The creditor waived his right to present his claim in bankruptcy, and in part had delivered to the debtor the evidences of his demand, and had no claim to present except the debtor's note for one-half the amount originally due him. That was a fraud on the creditor, but here there was only a promise to pay some-

thing more, and such has never been held to create a new obligation or to work an estoppel so as to prevent the bankrupt from relying on his discharge as a bar to the recovery.

There was no agreement to forbear, and it will not do to say that the mere forbearance to present the claim before the assignee in bankruptcy gives vitality to the promise and creates an obligation upon which the action can be maintained.

The mere assurance in the mind of the creditor that he will accept or forbear to act with reference to his claim will not amount to a contract with his debtor. He must forbear to present his claim by reason of some contract, made by both parties, based upon a consideration, or been so defrauded by the debtor as to estop the latter from relying on his defense in bankruptcy. A mere promise to pay is not sufficient. A mere promise to pay a debt already existing can not be made the foundation of an action. (*Gilmore v. Green*, 4 Bush, —.)

In *Stetpen v. Sherman*, 1 Sanford Superior Court, 510, it is said: "Although it is alleged that the new promise was made after the bankrupt's petition, it does not aver that it was made after his discharge. If before the discharge, it can not be set forth as an independent cause of action."

The letter written to the appellees prior to the discharge in bankruptcy sheds no light on the question. The appellant wanted the appellees to make advances to enable him to pay what he owed them, and this they declined to do.

The appellees were not entitled to the judgment.

The judgment is reversed and cause remanded for further proceedings not inconsistent with this opinion.

S. W. Bailey for appellant.

W. O. & J. L. Dodd for appellees.

SANSBERRY, &c. v. SIMMS' ADM'X.

(Filed October 18, 1881.)

1. Widow is not entitled to both dower and homestead right when the value of the homestead exceeds the value of her dower in her deceased husband's estate.

A widow does not forfeit her right to the homestead of her deceased husband by removing therefrom and leasing the same to her tenants.

3. The fact that her husband purchased and had conveyed to her a house and lot, to which she removed from the homestead after his death, did not present any obstacle to her right to the homestead.

4. The law gives to the widow the homestead for her use so long as she occupies it by herself, her tenant or agent, without reference to the kind or value of other property she may have in her own right, or the source whence she derives it.

Property given to the widow by the husband before his death should not be estimated in finding the value of the homestead.

5. There is no express provision in the law for the sale of the homestead right of a widow.

But when the adverse claimants consent in the lower court to the sale thereof they can not be heard in the Court of Appeals to object to the payment to her of the value of the homestead out of the money arising from the sale.

6. When the widow's homestead right is sold by decree of a court of equity on her application, without objection of the owner of the remainder, the one thousand dollars in lieu of the homestead right does not belong to her absolutely.

In such case the court should provide in the judgment, either for the safe investment of the \$1,000 for her use and benefit during life, or pay it over to her, requiring bond with good security for the return of it to the parties entitled thereto at her death, or give to her absolutely what her life estate in it is worth, rated by American Annuity and Life Tables, as she may elect.

Appeal from Washington Circuit Court.

Opinion of the court by Chief Justice Lewis.

In September, 1878, J. R. Simms died intestate and without children, but left a widow and a brother, sister and infant children of a deceased sister his heirs at law.

January 31, 1879, the widow brought this action, making the heirs at law defendants. In her petition she claimed a homestead exemption in a house and lot and dower in another lot, and alleging the property was not susceptible of division; asked for judgment directing the sale of both lots and the payment to her of the value of the homestead in money arising from the sale, and the residue to those entitled to it.

The court adjudged she was entitled to a homestead exemption in the property of the value of \$1,000, and ordered the sale, and the payment of that sum to her out of the proceeds, and the balance to the heirs. No order was made for allotment of dower to the widow, nor is she entitled to it, having claimed her homestead exemption, which exceeds it in value.

From that judgment the defendants have appealed, and the errors assigned by them will be considered in their order:

1st. They contend the court erred in adjudging she was entitled to a homestead exemption, because having, after the death of her husband, ceased to occupy the premises she forfeited her right to it.

She admits that about five weeks after her husband died she did leave the homestead, and removed to a house conveyed to her by him previous to his death, but denies the removal was permanent, and it is not shown it was. She states that the duration of her occupancy of the house to which she removed was intended to be only until she could sell it, which she desired to do. It appears that she leased the homestead and took notes for the rent payable to herself, and that, except a few weeks when she was absent on account of ill-health, it was continuously occupied by her tenants.

Construing section 14, article 18, chapter 88, General Statutes, this court, in the case of Phipps v. Acton, 12 Bush, 877, not essentially different from this, used the following language: "But we are of opinion that the widow's temporary absence from the premises, after having rented them out and placed her tenant in possession thereof, is not such an abandonment as will forfeit her claim to the homestead under the statute, for she may be said to be in possession by her tenant, and so long as she is in the occupancy or control of the premises, by herself, her agent or tenant, her right to the homestead will continue."

We consider that case a decision of the question of appellee's right to a homestead exemption in the property.

2d. It is contended that her husband having before his death provided her a house and lot in which to reside, and to which she removed after his death, the object and purpose of the law was complied with, and she ought not to have a homestead in the property owned by him when he died.

The record does not show either the consideration or purpose of the conveyance to her by her husband, nor is there any evidence she accepted the property so conveyed in lieu of her homestead exemption. It must, therefore, be regarded like any other property she may have owned, as being no obstacle to her claim of homestead exemption. The law gives to the widow the homestead for her use as long as she occupies it, by herself, her tenant, or agent, without reference to the kind or

value of other property she may have in her own right, or the source whence she derived it, and she can not be divested of her homestead right, except by her own act. Nor should the property given to her by her husband before he died be estimated in fixing the value of her homestead exemption.

It is true this court, in the case of *Miles v. Hall*, 12 Bush, 109, when the widow owned an undivided interest in her own right in the homestead itself, held such interest should be estimated as part of the exemption. But here the property owned by appellee is disconnected from, and constitutes no part of, the homestead. If a part of the widow's own real property may be estimated in fixing the value of the homestead exemption, all, or enough, if she have it, to equal the entire amount may be; thus in many cases depriving them of what the law in express terms gives them.

3d. It is contended that, though she may be entitled to the homestead while occupied by her, appellee is not entitled to any part of the money for which it was sold or to the use of it.

It is true the homestead is only for the use of the widow so long as she occupies it, and no express provision is made for the sale of it for her benefit. And, on the other hand, if it is not divisible, however valuable, the law makes no provision for the sale of it, except subject to her right of occupancy, even for the payment of debts against the estate of her deceased husband. If, therefore, the strict letter of the law is adhered to, cases of extreme hardship to creditors and heirs, as well as to the widow, may arise, requiring relief by courts of equity. But as justice may be done her without violating the letter or spirit of the law, it is not necessary to inquire how far a court of equity might go in such cases.

No objection was made by appellants in the court below to a sale of the property, nor do they ask a reversal of the judgment on that ground. Having consented to a judgment for the sale, which the court had no authority to render without, appellants can not be heard in this court to object to the payment to appellee the value of her homestead exemption out of the money arising from the sale.

4th. But the court below erred in adjudging she was entitled to \$1,000 absolutely. She is not entitled to a homestead

exemption of the value of \$1,000, but to such exemption in land, including the dwelling house and appurtenances, not exceeding in value that sum, and she did not acquire by the sale a greater interest or estate in the money for which it was held than she had in the land.

The court should have provided in the judgment either for the safe investment of \$1,000 for her use and benefit during life, and paid it over to her, requiring bond with good security for the return of it to the heirs at her death, or given to her absolutely what her life estate in that amount is worth, rated by the American Annuity and Life Tables, taking into consideration her age, health and probable duration of life, as she might elect.

For that error the judgment is reversed and cause remanded for further proceedings consistent with this opinion.

R. J. Browne and J. W. S. Clements for appellants.

John W. Lewis for appellee.

TABOR, &c. v. McINTIRE, &c.

(Filed October 8, 1881.)

Heir at law may be excluded by will from taking under the statute of descents any part of the undevise estate of the testator, or be limited in the use of such part as he would be entitled to take under said statute.

"For sundry reasons and bad treatment it is my will and wish that Boone Tabor shan't have any of my property, and Thomas McIntire only through a responsible trustee in the way of clothes and something to keep him from suffering."

Held—That Boone Tabor is excluded from receiving any part of the estate by descent.

That Thomas McIntire does not take absolutely, but that his interest should be put in the hands of a trustee.

That Boone Tabor being excluded his only brother is entitled to the full share of his mother, who was a sister of testator.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Hargis.

Malvina Congleton, having a brother and sister and nephews and nieces of three deceased brothers and one deceased sister, but without children, died leaving a holographic will, in the following language:

"For sundry reasons and bad treatment, it is my will and wish that Boone Tabor shan't have any of my property, and Thomas McIntire only through a responsible trustee, in the way of clothes and something to keep him from suffering."

It was probated by the county court of Montgomery, and an administrator with the will annexed appointed.

He and the brother, sister and nephews and nieces filed a joint petition, making the two infant children of one of the nieces who had died defendants, and asking a construction of the paper.

The court adjudged that she died testate as to part and intestate as to the remainder of her estate, and that the heirs and devisees take it as follows:

"First, Boone Tabor does not take or inherit any part of the estate of the deceased; second, Richard Tabor takes one-eleventh part of the whole estate; third, Thomas McIntire takes two-elevenths of the whole estate, to be paid over to a trustee, to be used by such trustee in such a way as to provide said Thomas McIntire with clothes, and to keep him from suffering."

To each of the stocks of those who were dead and to the living sister two-elevenths of the estate was adjudged.

From the judgment Boone and Richard Tabor appeal. They are the only children of one of the dead sisters.

For the appellant, Boone Tabor, it is insisted that the holograph quoted is not a will, because it simply changes the law of descent. While the testatrix had no right to alter the laws of descent, yet she had the right to dispose of her property as she wished, and might designate and exclude from participation in her estate persons who would otherwise inherit. The exercise of this right is the disposition of the share such excluded person would have received, and it results in giving it to another who she is presumed to have known would take it by descent. All she has done is to increase the interest in her estate of some of the inheritors, and destroyed and limited that of others. Had she given the whole of her estate to one and excluded all the others, no doubt could have arisen in any mind that she had made a will recognized by law, and as she excluded one, and limited another, and left her estate to be divided according to the law of descent among the others of

her next of kin, there can be no doubt that the totally excluded nephew can take nothing under the laws of descent.

She declares that the disposition contained in the holograph is her will and wish. And without indulging in a critical analysis of the facts of the authority cited, which show that the paper in that case was no will in truth, and not intended to be, so far as the omitted or objectionable persons were concerned, we are led to the conclusion that the paper wholly written and signed by Mrs. Congleton is a valid will.

But the court erred in not adjudging to the appellant, Richard Tabor, one-sixth instead of one-eleventh of the estate, for, as his only brother was excluded from participation in any part of the estate and no one pointed out to take the share of their mother, Richard inherits the whole of her share, because in no event can brothers and sisters jointly inherit with children.

Under the laws of descent the children, if any be living, take the estate of the deceased, and the brothers and sisters of the deceased never take by descent until it is shown that there are neither children nor their descendants, nor a father of the deceased living.

There can be no claim that the testatrix devised what Boone Tabor would otherwise have received by descent, but for his exclusion, to her brothers and sisters. She cut him off, and left her estate to be divided according to the laws of descent, except as to the appellee, Thomas McIntire, who does not take a vested right absolutely either to two-elevenths or one-sixth of the estate.

The language of the testatrix clearly indicates the purpose to reduce his portion below what he would have inherited from her.

She, in legal effect, says he shall not have any of her property except enough to clothe and keep him from suffering, and that she directs to be dispensed to him through a trustee.

This provision for him is a charge upon one-sixth of her estate, and as her will in regard to him may be carried out before one-sixth of her estate shall be consumed in the performance of the trust, it is evident he does not take a share absolutely.

The trustee should be put in possession of one-sixth of the estate, and he should, in view of the amount, and the habits

of his cestui que trust, prudently invest it, and expend a sum, first using the interest, sufficient to furnish him annually with clothing, food, and shelter; and should the interest be insufficient, the whole of the principal, if necessary, may be taken, not invading it, however, except as his annual necessities demand it.

Wherefore, the judgment is affirmed as to Boone Tabor, and reversed as to Richard Tabor, with directions to render judgment in conformity to the principles of this opinion.

Reid & Stone and O. S. Tenney for appellants.

W. H. Winn for appellees.

BRIGHTWELL v. COMMONWEALTH, FOR, &c.

(Filed October 27, 1881.)

1. The circuit court has jurisdiction to enforce the payment of bonds ex-
ecuted in the county court in bastardy cases.

In this case proceedings in equity were commenced in the circuit court to subject estate in which the defendant had an interest, after he had been released from the county jail upon taking the insolvent oath.

2. Owner of life estate in money was properly required in this case, to give bond for the forthcoming of the principal sum at the termination of his life estate.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Pryor.

The appellant, William Brightwell, by a proceeding under the statute in relation to bastardy, was adjudged to be the father of two infant children, and required to pay their mother a certain annual sum for each child during a fixed period. The appellant, failing to pay the money or to execute a bond as required by the statute for its payment, was lodged in jail, and afterwards released from custody upon taking the insolvent debtor's oath.

Subsequent to that an execution issued on the judgment in favor of the mother, and was placed in the hands of the sheriff of Franklin county, and by him returned no property found.

In January, 1878, the mother, in her own right and for the use of her infant children, filed this petition in equity in the Franklin Circuit Court against William Brightwell and others, in which it is alleged that the appellant (Brightwell) had con-

veyed all his property to his wife to avoid the payment of this debt; that the wife was dead, and her administrator had in his hands moneys, that of right belonged to the appellant, sufficient to pay the debt.

The conveyance sought to be set aside passed to the wife the title to certain land, described in the petition, that belonged to the husband. The appellant denied the fraud, and pleaded the proceedings in the county court on the charge of bastardy in bar of appellee's action, averring that the county court alone had jurisdiction to enforce the judgment. There was money enough in the hands of Mrs. Brightwell's administrators to pay the debt, and by virtue of the judgment the amount was paid over and the judgment satisfied.

It seems to us the only question in the case is as to the jurisdiction of the circuit court. The insolvent debtor's oath, independent of the return no property found on the execution issued from the county court, gave to the chancellor jurisdiction unless the remedy is exclusively with the county court. If the remedy is confined to the execution on the judgment to be issued from the county court or a rule against the party in default, it would result that the appellee had no means of enforcing the judgment in this case, although the appellant is the owner of an estate ample to satisfy the demand. We do not understand that the remedy for enforcing such a judgment is to be found alone in the statute under which the proceeding was had.

Other remedies must necessarily attach when that afforded by the statute is incomplete, and not restricted by its express provisions.

The county court had no jurisdiction to pass upon the question of title to the land sought to be subjected, and with even a jurisdiction belonging alone to the chancellor, there is no reason why the appellee should not be permitted to invoke its exercise. Bonds executed by the father of the bastard child for its support have been enforced in the circuit courts of the State. The right to make the debt out of the estate of the appellant is not questioned, and as there is no remedy provided by the statute under which the proceedings were had so as to enable the creditor to reach the property covered up by the

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fraudulent act of the debtor, the remedy must be sought in that tribunal authorized to apply it where it has jurisdiction of the amount in controversy. (Thompson v. Buckhannon, 2 J. J. Marshall, —; Hamilton v. Caudle, 3 Monroe, —.)

During the progress of this case the children of Brightwell were before the court and claimed an interest in remainder in the moneys held by the administrator of their mother, alleging that the appellant was entitled to the use for life only.

The extent of the interest of the appellant in the property had been previously determined by this court in another proceeding, and the remaining question in the case is, did the chancellor err in requiring of the appellant bond with surety for the forthcoming of the principal sum at the termination of his life estate? The record of the former proceedings with reference to this property shows the appellant to be a man of rather intemperate habits, and hostile to his children, whether with or without cause it is not necessary to inquire, and under the circumstances the chancellor acted properly in protecting the interest of those in remainder.

There is no error in the record prejudicial to the rights of appellant.

Judgment affirmed.

A. J. James for appellant.

J. & J. W. Rodman for appellee.

LEAR, &c. v. LANCASTER & BUCKEYE TURNPIKE ROAD CO.

(Filed October 27, 1881.)

1. Subscription for \$5,000 stock in turnpike road company was invalid in this case.

Act of March 20, 1880, authorizing such subscription by the county court in the name of Precinct No. 2, is unconstitutional for reasons stated in the opinion of the court.

Said act provides that the dividends upon the stock shall be received by the school commissioner of the county, and by him divided pro rata among the common schools of said precinct.

2. The principle upon which local taxation may be imposed for purposes of building turnpikes, etc., by private corporations is that they become the property of the stockholders, and the profits arising from them are to be divided amongst those who contribute, or are taxed, to build them.

3. Petitioners to county court requesting it to subscribe for stock in turnpike road company have a right to withdraw their names and sign a remonstrance before the petition is presented to the county court.

Appeal from Garrard Circuit Court.

Opinion of the court by Chief Justice Lewis.

By an act of the general assembly, approved March 20, 1880, the judge of the Garrard County Court was empowered to subscribe \$5,000 to the capital stock of the Lancaster and Buckeye Turnpike Road Co., a corporation previously created, in the name of Precinct No. 2 of that county, whenever a majority of the qualified voters of that precinct should so request in writing. And to provide for raising that sum the county judge was authorized to issue, in the name of the precinct, bonds bearing 8 per cent. interest, and to assess and cause to be collected an ad valorem tax upon the taxable property in the precinct sufficient to meet the interest and principal of the bonds as they respectively fell due.

It is further provided in the 7th section of the act that the dividend upon the stock shall be received by the stock commissioner of Garrard county, and by him divided pro rata among the common schools of that precinct.

The county judge having, by an order of court, made a subscription of \$5,000 to the capital stock of the company, and issued bonds of that amount in the name of the precinct, and placed them in the hands of Sandifer, treasurer of the county, to be negotiated and sold, and also caused the taxable property of the precinct to be assessed, and ordered the sheriff of the county to proceed to collect the taxes from the taxpayers of the precinct to pay the principal and interest of the bonds. Appellants, who are residents and taxpayers of the precinct, brought this action against the turnpike company, the county treasurer, the sheriff, and common school commissioner of Garrard county, and obtained an injunction restraining the negotiation and sale of the bonds and the collection of taxes to meet the principal and interest.

Upon the trial the court below rendered judgment dissolving the injunction so far as it enjoins and restrains the sale of the

bonds and permits the defendant, Sandifer, the county treasurer, to proceed to make sale of them. But the injunction so far as it restrains the collection of the tax by the sheriff to pay the principal and interest of the bonds is perpetuated.

The injunction as to both the sheriff and county treasurer should have been dissolved or perpetuated.

But there are more serious errors in the judgment than that.

It appears from the petition, the allegations of which are upon demurrer to be taken as true, that the county judge refused to receive or consider the written protests of qualified voters of the precinct against the subscription of stock, and that an actual majority of those who gave written expressions of their will upon the subject were opposed to and protested against the subscription. The act of the legislature requires the subscription to be made only when a majority of the qualified voters of the precinct shall so request in writing. A portion of them who had signed the petition before it was presented to the county court withdrew their names and signed a remonstrance, which they had a right to do, and on the day the order was made by the county judge a majority of the qualified voters of the precinct were before him protesting in writing against it.

His order is, therefore, a violation of the act conferring the authority upon him to make the subscription, and is void.

But even if the subscription had been made and bonds issued in pursuance of the act the injunction should have been perpetuated. The principle upon which local taxation may be imposed for purposes of building turnpike roads by private corporations is that they become the property of the stockholders, and the profits arising from them are to be divided amongst those who contribute or are taxed to build them.

By the provisions of the act in question the citizens of Precinct No. 2 are not only to be taxed upon a mere petition to the county judge of a majority of the qualified voters, but the profits arising from the road after it is built are to be taken from them without their consent and appropriated to common schools.

The legislature goes as far as the Constitution authorizes in providing by statute that taxpayers may be compelled to pay

for building turnpike roads that belong to private corporations, but possesses no power under the Constitution to enact a law by which they may be deprived of the dividends upon such enforced investments after they are made.

The act being void, all the proceedings in pursuance of it are so.

Wherefore, the judgment is reversed and cause remanded, with directions to perpetuate the injunction against the sale of the bonds placed in the hands of the county treasurer, and for further proceedings consistent with this opinion.

Burdett & Walton for appellants.

R. P. Jacobs and M. J. Durham for appellees.

DAVIS, MOODY & CO. v. WILEY.

(Filed October 25, 1881.)

1. Objection to sufficiency of pleadings, when first made in Court of Appeals, must be confined to the objections that the petition does not state facts sufficient to constitute a cause of action, and the reply does not state facts sufficient to constitute a defense to the answer and set-off.

2. Defects in petition not demurred to in lower court must be disregarded by Court of Appeals, if the issue was either made by the answer or submitted to and tried by the jury.

3. A third person may maintain an action in his own name upon a contract supported by a consideration made in his favor, though not made to him. And he may sue upon such contract without a consideration passing from him to the promisor.

4. One partner may bind the firm, whether the co-partnership be commercial or noncommercial, in all business relating to the partnership, and in the regular and necessary course of the business.

Appeal from Jefferson Circuit Court.

Opinion of the court by Chief Justice Lewis.

On the 19th of March, 1870, the firm of Davis, Storts & Co. executed a promissory note for \$400 to appellee, and on the 1st of January, 1876, the firm of Davis, Moody & Co., composed of W. Davis, George E. Moody, John Mangold and — Campbell executed to him a note for the same amount.

This is an action by appellee against the present firm of Davis, Moody & Co., composed of George E. Moody, John Mangold and John Mitchell, to recover the amounts of the two notes, less credits specified, upon the alleged promise and un-

dertaking of the latter firm to pay, as the successors, the debts of the two preceding firms.

Upon the trial the jury returned a general verdict in favor of appellee for the amounts of the two notes, subject to credits allowed, and also thirteen special verdicts.

Appellants moved the court for judgment in their favor upon the special verdicts notwithstanding the general verdict, and also upon grounds filed moved the court to set aside the general verdict and grant them a new trial. But both motions being overruled and judgment rendered in accordance with the general verdict they have appealed to this court, and assigned the following errors:

1st. That the court erred in overruling their motion for judgment upon the special verdicts, notwithstanding the general verdict, and in giving judgment for appellee.

2d. In refusing to render judgment for them, or to dismiss the petition as to either of the notes.

3d. In overruling their motion for a new trial.

The grounds of the motion for a new trial are, first, that the court erred in giving the instructions not asked by the plaintiff; second, that the general verdict is not sustained by sufficient evidence; third, that the general verdict is contrary to law. But as the record does not show at whose instance any of the instructions were given, and there is no bill of exceptions containing the evidence, this court can not consider the two first grounds. The third ground will be considered in connection with other questions.

Various questions arising from both the pleadings and proceedings had at the trial are presented. But as no demurrer was filed in the court below the inquiry as to the sufficiency of the pleadings must be confined to the objections that the petition does not state facts sufficient to constitute a cause of action, and the reply does not state facts sufficient to constitute a defense to the answer and set-off.

The first question to be determined is whether appellee can maintain this action at all, founded, as it is, upon the alleged promise of appellants made, not to him, but to the firms of Davis, Storts & Co., and the first firm of Davis, Moody & Co., to pay their debts, including the notes given to him?

There is a conflict of the authorities in this country upon the subject, and the right was not recognized in the earlier decisions of this court, but it is now settled in this State that a third person may maintain an action in his own name upon a contract, supported by a consideration, made in his favor, though not made with him. (Smith v. Lewis, 3 B. M., 229; Lucas v. Chamberlain, 8 B. M., 276; Allen v. Thomas, 3 Metcalfe, 198; Story on Bailments, section 103; 1 Chitty on Pleading, page 4.) And he may sue upon such contract without a consideration passing from him to the promissor.

2d. Appellants contend that this action being founded not upon the note, but upon their alleged parol promise made to the preceding firms to pay the notes, the petition is fatally defective because it is not alleged there was a consideration for such promise. It is true no consideration is alleged in expresse terms, but it is attempted to be, and is imperfectly pleaded.

It is stated in the petition substantially that the appellants are the successors of Davis, Storts & Co., and the first firm of Davis, Moody & Co., and as such successors agreed to pay their debts, including the two notes given to appellee.

Appellants might have demurred in the court below, but having failed to do so and filed their answer and gone to trial, the defect of the petition on that account must be disregarded by this court if the issue was either made by the answer, or submitted to and tried by the jury.

"When there is any defect, imperfection or omission, even of substance in pleading which would have been fatal on demurrer, yet if the issue joined is such as necessarily required on the trial proof of the facts so imperfectly stated or omitted, and without which it is not to be presumed the judge would direct the jury to give, or that the jury would have given, the verdict, such defect or omission is cured by the verdict, * * * and it would be more than useless to send the case back from this court in order that the declaration should be amended by introducing that fact to be again presented for the consideration of the jury." (Wilson v. Hunt's Adm'r, 6 B. M., 380; Louisville & Portland C. C. v. Murphy, 9 Bush, 539; 1 Chitty on Pleading, 673.

In their answer, though denying they agreed to pay either of the notes, appellants do not deny they are the successors of the two firms by whom they were executed. And, besides, they file with their answer, and plead as an offset to the note given March 3, 1870, an account beginning about that date, and which manifestly belonged to the two preceding firms, for the firm sued in this case did not then exist. But even if the issue of consideration or no consideration be not expressly made by the pleadings, it must be presumed it was submitted to, and tried by, the jury, and, therefore, that objection to the petition is not available here.

3d. It is contended that the action, being upon a promise to answer for the debt of another, is inhibited by section 1, chapter 22, General Statutes.

"It is only where the promise is distinctly collateral that it is within the statute, * * and the party for whom the promise has been made must be liable to the party to whom it is made. * * * The statute applies only to promises made to the person to whom another is amenable." (Parsons on Contracts, volume 8, sections 20-26, and notes.)

"That the statute of frauds applies only to promises made to the person to whom another is already, or is to become, responsible, and not to promises made to the debtor, on a sufficient consideration, may be regarded as conclusively settled both in England and in this country." (North v. Robinson, 1 Duvall, 73; Lucas v. Chamberlain, supra; Hayden v. Christopher, 1 J. J. M., 383.)

In this case the promise is made to the debtor and not to the creditor, and is not a promise to answer for the debt of another in the meaning of the statute.

4th. Appellants say that the reply contains no specific denial of the account pleaded by them as a set-off, and, therefore, judgment should have been rendered in their favor for the amount of it.

Though the allegation of the answer in respect to the account is not traversed in the reply, a settlement of the account on the 1st of January, 1876, is alleged, and one of the questions submitted to the jury, to which they responded affirmatively in a special verdict, was whether there was such settlement.

5th. As defenses to the note dated January 1, 1876, it is alleged in the answer, first, that it is not the act and deed of the first firm of Davis, Moody & Co.; second, that it was executed by Wm. Davis, a member of that firm, without the knowledge or consent of the other members of the firm, and in pursuance of a fraudulent agreement between him and appellee; third, that it is without consideration.

In the absence of the evidence heard upon the trial, the facts can be but imperfectly understood, and only such conclusions can be arrived at as may be deduced from the pleadings and special findings of the jury.

The jury, in the special verdicts, find and say in substance that the salary the first firm of Davis, Moody & Co. paid to appellee during the year 1875 was \$30 per week, and none of the members of that firm but Davis agreed to pay him for that year more than that; that the note was executed by Davis without the consent of the other members of the firm, and they did not know of its execution at the time, and first learned of its existence from appellee in July, 1878. The jury further find that the note was given for balance of unpaid salary, and that appellee did not purposely conceal the fact he held the note.

It then appears the note was executed by a member of the firm, and the consideration of it was unpaid salary. The other facts that it was given without the knowledge or consent of the other members, and that the salary paid for the year 1875 was \$30, and no other member of the firm but Davis agreed to pay more, do not invalidate the note, because they stand isolated and appear to have no bearing upon the simple question whether the firm was indebted to appellee the amount for which the note was given. Certainly they can not, unexplained and unaided, negative the other fact found by the jury that the note was given for balance of unpaid salary, nor countervail the logical deduction from that fact that such balance was a just demand. Neither is the court authorized, as the record stands, to say, notwithstanding the verdict of the jury and judgment of the court below, the execution of the note was fraudulent.

But counsel for appellants contend that, it being fairly inferable that the partnership was noncommercial, it is a question of fact and not of law whether one of the partners had the power to bind the firm, and that, according to the doctrine announced by this court in the case of *Judge v. Brasnell*, 18 Bush, 67, it rested upon appellee to show either express authority in Davis to execute the note, or that such was the custom and usage of that particular branch of business in which the firm was engaged, or such facts as will warrant the conclusion the requisite authority had been given. One partner may bind the firm in all business relating to the partnership and in the regular and necessary course of the business, whether the co-partnership be commercial or noncommercial. There is no question of appellee being in the service of the firm with the knowledge and consent of all the members of the firm. The jury say the note was given for a balance of salary due to appellant for his services to the firm. It would be a perversion of the law to say that a firm thus partly indebted for services rendered by its servant or agent is not bound upon a note given in consideration of such indebtedness, merely because no express authority is shown in any one member to execute it.

The general verdict does not appear to be inconsistent with the special verdicts, and we perceive no error in the refusal of the court to disturb it.

Wherefore, the judgment is affirmed.

Russell & Helm for appellants.

Rodman & Brown for appellees.

WHITTAKER v. MILLIEN.

(Filed October 15, 1881—Not to be reported.)

Vendor is not entitled to judgment for purchase money for land when the legal title to the land is held by a nonresident, although such nonresident is made a defendant and constructively summoned.

Appeal from Madison Court of Common Pleas.

Opinion of the court by Chief Justice Lewis.

In this case the appellants, though put upon the proof of title, did not show either a legal or equitable title in them-

selves. They allege their ancestor many years ago purchased the land from one Silas Barnes who gave him a title bond, but do not exhibit or prove the bond ever existed.

Barnes is a nonresident of the State, and even if he had been constructively summoned in the manner required by the Civil Code, would have one year after the actual service of a certified copy of the judgment upon him, and five years without such service, in which to appear and have the action retried.

Appellee is not required to accept any but a good title to the land before judgment against him for the purchase price, and as the court had no authority, as the case stood, to direct a conveyance by commissioner which might not hereafter be cancelled by Barnes, and he did not appear in person to make the conveyance, appellants were not entitled to judgment for any more than it was rendered for.

Wherefore, the judgment is affirmed.

C. F. & A. R. Burnam for appellant.

T. J. Scott for appellee.

[The following is republished because of errors in the copy from which it was published in our October number:]

MINTON v. COMMONWEALTH.

(Filed June 20, 1881.)

Self-defense—Rule, as to, stated by the court—"Whenever a man is in imminent danger of great bodily harm, or it is being inflicted on him, whether it endangers his life or not, he has the right to use such force as appears to him in the exercise of a reasonable judgment, to be necessary to repel or deliver himself from it, unless by his own wrongful act he makes the harm or danger to himself necessary or excusable in the person who is inflicting or about to inflict it upon him."

See in opinion erroneous instructions as to self-defense.

Recklessly using or discharging pistol, without intending to injure any one thereby.

See in opinion erroneous instructions as to this offense.

Appeal from Breckinridge Circuit Court.

Opinion of the court by Judge Hargis.

The appellant, Minton, as the evidence tends to show, was at his voting precinct, partially intoxicated, on the day of the

election for representative to the legislature, and that Willis T. Frank, who was a candidate for that office, and the favorite of Minton, was also there, when one Speak rode up in haste huzzaing for Frank's opponent. He alighted from his horse, began dancing, and continuing to shout for his candidate, and Minton answered him with a shout for his candidate. This occurred several times, when Minton struck him once or twice in the back of the head or neck, and Speak turned and seized him by the throat, backing him to a corner of the fence, and choked him until he was black in the face. The father of Minton attempted to separate them, and while he was so engaged, or just afterwards, the appellant, Minton, drew his pistol, and, either intentionally or accidentally, fired it and killed said Willis T. Frank. Immediately after the shot the crowd, which had pressed close to Speak and Minton during their struggle, manifesting favor to the former, loudly exclaimed, "kill him," and pursued Minton with rocks and clubs.

He was indicted, tried and convicted of the offense of manslaughter, and sentenced to the penitentiary for twenty-one years, and he prosecutes this appeal, seeking a reversal mainly on the ground that the court erroneously instructed the jury.

This is the only question necessary to be considered.

The fifth instruction is as follows:

"But if defendant assaulted Speak, and Speak repelled the assault with more violence and more force than was necessary to defend and protect himself from the force offered by defendant, and was inflicting, or about to inflict, great bodily harm upon defendant, such as would endanger his life, or if defendant believed, and had reasonable grounds to believe, that Speak was then about to inflict great bodily harm upon him, such as would endanger his life, and he had no other apparently safe means of escaping therefrom, then he had the right to use such force and such means, and no more, as was necessary to save himself from such impending danger; and if Frank was killed by the use of such means the defendant is excusable, and should be acquitted."

By this instruction the jury were in effect told that the defendant had no right to shoot in his self-defense unless the

bodily harm which was being, or about to be, inflicted upon him endangered his life. This is not the law of self-defense. Whenever a man is in imminent danger of great bodily harm, or it is being inflicted on him, whether it endangers his life or not, he has the right to use such force, as appears to him, in the exercise of a reasonable judgment, to be necessary to repel or deliver himself from it, unless by his own wrongful act he makes the harm or danger to himself necessary or excusable in the person who is inflicting or about to inflict it upon him.

While putting out an eye, cutting off an ear, slitting the nose, bruising the body, or choking a man with great violence may not endanger his life, still he has the right to use such force, even to the taking of life, as may be reasonably necessary to prevent or rid himself of imminent danger of the unlawful infliction of such injuries upon him.

The court erred in limiting the degree of bodily harm to such as endangered the defendant's life. And to that extent only the instruction quoted was erroneous.

We quote the 6th instruction, which is: "If the jury shall believe from the evidence that at the time the pistol was fired by the defendant the fight between defendant and Speak had ended, and that defendant had no intention of using it in the fight, or of renewing the fight with Speak, but was holding it merely as a weapon of defense, and it was discharged by accident, and not designedly or recklessly on the part of defendant, and by such discharge Frank was killed, the defendant is excusable, and should be acquitted.

Instruction No. 3, taken in connection with the one quoted, excludes the defendant from the benefit of the law applicable to the reckless use or discharge of the pistol without intending to injure any one thereby. For if after the conflict had ended between defendant and Speak the pistol was accidentally fired, resulting from the recklessly careless use of it by the defendant, in view of the facts of this case, he was guilty of manslaughter, but not of murder, and the jury should have been so instructed. (*Chrystal v. Commonwealth*, 9 Bush, 671.) There was no instruction given presenting this view of the case to the jury. We see no other error in any of the instructions given.

Wherefore, the judgment is reversed and cause remanded the for a new trial.

Mercer & Kinchloe for appellant.

P. W. Hardin for appellee.

ABSTRACTS OF KERTUCKY DECISIONS.

MANSS, AULT & CO. v. JONES' ADM'R.

Filed October 1, 1881—not to be reported.

Appeal from Owen Circuit Court.

Opinion of the court by Judge Pryor, reversing.

Appellants, under the facts of the record, had a right to show that they held the notes as mere collaterals.

Lillard & Hallam for appellants.

Strother & Orr for appellee.

FREEMAN v. LANDER.

Filed October 1, 1881—Not to be reported.

Appeal from Marshall Circuit Court.

Opinion of the court by Chief Justice Lewis, affirming.

1. Failure to give bond is a sufficient cause to discharge attachment.

2. Error cured by verdict—"It is true the claimant of the property does not allege in his petition that he was the owner of the property when the attachment was issued, nor deny the allegation of appellant that the property, at that time, belonged to S. E. Lander. But he does allege he was the owner when the mare and colt were levied on. This belongs to that class of cases where the defect or omission in pleading is aided by intendment after verdict."

3. The law and the facts having been submitted to the judge by agreement of parties, his finding of the facts must be received by the Court of Appeals as would be the verdict of a jury.

Gilbert & Reid and C. Bennett for appellant.

DAWSON, &c. v. BABCOCK, &c., ASS'EE.

Filed October 4, 1881—Not to be reported.

Appeal from Davies Circuit Court.

Opinion of the court by Judge Pryor, affirming.

Defense of no consideration is not available in this case in an action to recover the price agreed to be paid for a patent washing machine. Defendant alleged that the plaintiff had parted with the territory sold him before making sale to him. Proof showed that if this was so the plaintiff re-acquired such territory before the defendant sustained any damage by such defect of title, if any such defect existed.

George W. Jolly for appellants.

Sweeney & Son for appellees.

WESTERLAND v. MORELAND.

Filed October 1, 1881—Not to be reported.

Appeal from Ohio Circuit Court.

Opinion of the court by Judge Pryor, affirming.

Right of election waived—Under the law exempting certain property from sale under execution a debtor has the right to elect which of several pieces of property, each sufficient to satisfy the debt, shall be sold; but if he be present at the sale and makes no objection his right of election is waived, and the sheriff may sell whichever piece he may deem proper.

Townsend & Massie for appellant.

Walker & Hubbard for appellee.

GLASS v. TEVIS, &c.

Filed October 1, 1881—Not to be reported.

Appeal from Shelby Circuit Court.

Opinion of the court by Chief Justice Lewis, reversing.

The separate estate of a married woman can not be subjected to the payment of her debts by an ordinary action. If done at all, it must be by proceeding in equity, the chancellor only having the power to subject it.

The action in this case was to recover a personal judgment against a married woman upon an account for the tuition of her daughter.

Bullock & Beckham for appellant.

Caldwell & Harwood for appellees.

YOUNG v. BENGE'S ADM'X, &c.

Filed October 1, 1881—Not to be reported.

Appeal from Clay Circuit Court.

Opinion of the court by Chief Justice Lewis, affirming.

Petition improperly dismissed—Creditor of decedent filed his petition against his administratrix and others, alleging that decedent was the owner of a tract of land at the time of his death, to which he alleged one of the defendants held the title for his benefit. Defendant's answer controverting material allegations of the petition, not being replied to, action being submitted for trial on the pleadings the petition was properly dismissed.

A. R. Cook for appellant.

WARE v. CLARK'S RUN AND SALT RIVER TURNPIKE CO.

Filed October 4, 1881—Not to be reported.

Appeal from Boyle Circuit Court.

Opinion of the court by Chief Justice Lewis, affirming.

1. It is the duty of turnpike companies to keep their roads free from obstructions and safe for the passage of persons and property.

2. Rights of the public in chartered turnpikes—"Though a chartered turnpike is the private property of the company, it is also a public thoroughfare, upon which any person may lawfully travel, whether he be required by the terms of the charter to pay toll or not."

3. The petition was defective in this case because it failed "to allege either that the particular wagon by which he was injured was placed in the road with the knowledge or permission of the company, or that the obstructions alleged by him to have been constantly placed in the road with the knowledge and permission of the company were at the same place he received the injury or where he was in the habit of passing."

ALLISON v. MOORE, &c.

Filed October 6, 1881—Not to be reported.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor, affirming.

1. A devise of her general estate by a married woman passes no title.
2. No person can testify for himself in chief, in either an ordinary or equitable action, after taking other testimony for himself in chief. (Civil Code, section 600, subsection 4).

Where such previous testimony in chief has been withdrawn, and the testimony of the person desiring to testify for himself in chief is then offered, in the absence of any provision in the Code governing such cases the Court of Appeals will be compelled to consider the case without regard to the testimony of either.

A conveyance assailed in this case was made in consideration of love and affection, and was free from fraud or undue influence.

Duke & Richards for appellant.

Baker & Toney and Wm. Lindsay for appellees.

MERRIWETHER v. MERRIWETHER, &c.

Filed October 6, 1881—Not to be reported.

Appeal from Shelby Circuit Court.

Opinion of the court by Judge Pryor, reversing.

Duty of trustee in management of trust estate—In making an investment of trust funds the trustee is bound to exercise such prudence and discretion as men ordinarily exercise with reference to their own affairs, but no greater degree of care is required.

In this case the investment, a loan, was made on land which was a sufficient security at the time of making the investment, but afterwards depreciated in value and caused a loss, for which the trustee is not responsible.

A. Duvall and Ira Julian for appellant.

Bullock & Beckham for appellees.

CAMP v. SECOND NATIONAL BANK OF LOUISVILLE.

Filed October 8, 1881—Not to be reported.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor, affirming.

In proceeding to set aside a judgment on ground of infancy at the time of the service of summons, a defense to the action must be set forth, and if there is no other than infancy the chancellor should not interfere.

W. T. Thurman and M. Boland for appellant.

D. M. Rodman for appellee.

GODSYE v. LEWIS, &c.

Filed October 8, 1881—Not to be reported.

Appeal from Perry Circuit Court.

Opinion of the court by Chief Justice Lewis, affirming.

Misjoinder of actions—It was too late for the Court of Appeals to inquire whether there was a misjoinder of actions in this case.

Plaintiff in the court below sued on two notes, one being assigned to him merely to sue upon it. Defendant made defense to each note, and by cross answer made the real owner of the assigned note a party to the action. On the trial of all the issues raised in the pleadings the court rendered two judgments against the defendant, one in favor of the real owner of each note.

D. W. Lindsey and Lytle & Combs for appellant.

MAYS v. COMMONWEALTH.

Filed October 8, 1881—Not to be reported.

Appeal from Graves Circuit Court.

Opinion of the court by Chief Justice Lewis, affirming.

Prescription under local option law in Mayfield of one quart of whisky can not be filled by selling one pint at one time and same quantity at another time.

By the third section of the act, entitled "An act to regulate the sale and giving away of spirituous, vinous or malt liquors in the city of Mayfield, Graves county, or within one mile of said city," approved February 19, 1878, it is provided that "no prescription shall be good for the obtaining of any such liquor more than one time," etc.

Under this provision, although the prescription may be for a quart, the purchaser will not be allowed to take one pint at one time and the remainder at another.

Samuel H. Crossland for appellant.

P. W. Hardin for appellee.

HUNTER, &c. v. BEARN, &c.

Filed October 11, 1881—Not to be reported.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Pryor, affirming.

1. The contracts of an infant are voidable, not void.

2. Proper time to plead infancy—Where infant has signed a mortgage the proper time to plead infancy in order to avoid it is in the action of foreclosure, and he can have no relief in an independent action after foreclosure on the sole ground of infancy when he executed the mortgage.

Thomas & Wathen for appellants.

Muir & Wickliffe for appellees.

SALMON v. KLINGER, &c.

Filed October 11, 1881—Not to be reported.

Appeal from Daviess Circuit Court.

Opinion of the court by Chief Justice Lewis, affirming.

A commissioner's report of the settlement of partnership accounts, which has been confirmed and judgment rendered in conformity thereto, without exceptions having been taken, will not be disturbed by the Court of Appeals.

Williams & Powers for appellant.

November, 1881—5

MILLER, COUNTY ATTORNEY v. BAUGHMAN.

Filed October 11, 1881—Not to be reported.

Appeal from Lincoln Circuit Court.

Opinion of the court by Chief Justice Lewis, reversing.

1. County attorney has right to appeal in certain cases—Where the legislature confers upon a county attorney the right to prosecute in his own name an appeal to the circuit court from an allowance of the court of claims against the county, it will be inferred by the Court of Appeals that the legislature also intended to confer upon him the right to appeal to that court if the ends of justice, in his opinion, should demand it.

2. "An act requiring persons having claims against the counties of Magoffin, Floyd, Carter, Elliott, Johnson, Menifee, Fleming, Lincoln, Nicholas, Robertson, or Bath, to file them ten days before the first day of their annual court of claims," approved March 29, 1880, is not unconstitutional as relating to more than one subject, or as not embracing its subject in its title, because it confers upon the county attorney the right to appeal to the circuit court in his own name from an allowance of the court of claims against his county. "Although the subject of the law is not expressed in its title with technical accuracy, it is done so substantially."

W. H. Miller for appellant.

Welch & Saufley for appellee.

McFERRAN & SON v. CALLAHAN.

Filed October 11, 1881—Not to be reported.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor, affirming.

As the proof is conflicting as to the facts this court will not disturb the judgment.

Barret & Brown for appellants.

Lane & Harrison for appellee.

COMMONWEALTH v. RUDD.

SAME v. SAME.

Filed October 11, 1881—Not to be reported.

Appeal from McCracken Circuit Court.

Opinion of the court by Chief Justice Lewis, reversing.

That a member of the grand jury is a civil officer is not a cause for setting aside an indictment. (*Commonwealth v. Pritchett*, 11 Bush, 277.)

The civil officer in this case was a notary public.

P. W. Hardin for appellant.

BLYTHE'S EX'OR v. OWENS.

Filed October 12, 1881—Not to be reported.

Appeal from Calloway Circuit Court.

Opinion of the court by Chief Justice Lewis, affirming.

1. Errors not presented as grounds for a new trial, in a civil case, will not be considered by Court of Appeals.

2. Where the judge does not certify that the bill of exceptions contains all the evidence heard upon the trial the Court of Appeals can not pass upon the question as to whether the verdict is contrary to the evidence.

W. L. Weathers for appellant.

John G. Miller for appellee.

CURRY, ASS'EE v. WALTER.

Filed October 13, 1881—No to be reported.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Pryor, reversing.

A deed to a purchaser at a sheriff's sale of property which has been appraised as required by law, executed after the expiration of the time for redemption is valid, notwithstanding the property may have been sold at a sacrifice.

Samuel Cleaver and Rodman & Brown for appellant.

Kohn & Barker for appellee.

RADLY'S ADM'R. &c. v. SHOWER'S ADM'R, &c.

Filed October 13, 1881—Not to be reported.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Pryor, dismissing appeal.

Appellant must bring proper parties before the Court of Appeals.

Skaggs in this case attempted to enforce the collection of purchase notes for land executed by Elliott. Elliott defended by alleging that Radly had a lien on the land. Radly came into the case and sought to enforce the lien. A personal judgment was rendered against Elliott, and Radly's claim to the lien dismissed. Elliott's administrator and heirs and Radly's administrator appeal. The court say:

"We do not see what Elliott's heirs and the administrator have to appeal from. The judgment dismissing the claim of Radly left them without any defense to the notes, and Radly, who seeks to enforce the lien on the land, must make Elliott's heirs appellees, and not appellants, as it is against their land his lien is sought to be enforced."

J. P. Hobson for appellants.

Wm. Lindsay for appellees.

REID v. CAIN, &c.

Filed October 15, 1881—Not to be reported.

Appeal from Bourbon Circuit Court.

Opinion of the court by Judge Hargis, reversing.

1. The assignee of a note put on the footing of a bill of exchange is protected against the claims of others unless he has notice of their asserted equities or was guilty of fraud.

2. The remedy for the breach of a written contract being complete at law, in this case, the court of equity did not err in dismissing the action without prejudice.

3. Ordinary and equitable actions were improperly united in this case.

4. Defendants residing in different counties—If judgment is not rendered against the defendant residing or summoned in the county in which the

action is brought it is error to render judgment against a defendant residing and summoned in another county.

Prall & Dickson for appellant.

Beck & Thornton for appellees.

McCULLUM v. HAYS.

Filed October 15, 1881—Not to be reported.

Appeal from Bullitt Circuit Court.

Opinion of the court by Judge Pryor, affirming.

Corn levied on in this case was exempt from execution or attachment.

R. J. Meyler for appellant.

F. P. Strauss for appellee.

MORGAN v. GROVER & BAKER SEWING MACHINE CO.

Filed October 15, 1881—Not to be reported.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Pryor, affirming.

1. A receiver was properly appointed in this case to collect and distribute money claimed by different persons.

2. Rule against defendant to pay money into court not being complied with, an ordinary execution was properly ordered to be issued against him.

Little & Slack for appellant.

Owen & Ellis for appellee.

BROWN, &c. v. MUNDY'S ADM'X, &c.

Filed October 15, 1881—Not to be reported.

Appeal from Bourbon Circuit Court.

Opinion of the court by Judge Hargis, reversing.

The issue of customary marriages of negroes are legitimate, whether such marriages were entered into before or after the adoption of the act of February 14, 1868, "in relation to the marriage of negroes and mulattoes."

G. C. Lockhart for appellants.

GIBBS v. GIBBS, &c.

Filed October 18, 1881—Not to be reported.

Appeal from Logan Circuit Court.

Opinion of the court by Judge Pryor, affirming.

1. The demurrer to the petition in this case was properly sustained.

2. The umpire had no right to correct the award, the arbitrators not being present and not consenting.

J. S. Golloday for appellant.

R. S. Bevier for appellees.

KNOTT v. JOHNSTON, &c.

Filed October 18, 1881—Not to be reported.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Lewis, affirming.

1. Description of lot in judgment should be "certain and definite enough to enable the officer to identify the lot without reference to any other paper."

2. The acknowledgment of a deed by a feme covert should not be simultaneous with the acknowledgment by the husband, but it is not material which of them first acknowledges it before the clerk.

3. A purchaser of mortgaged property will not be prejudiced by paying the purchase price subject to the order of the court, where the court has in effect adjudged that the encumbrance must be removed from the property before any part of it is paid to the vendor.

Ward & McAfee for appellant.

Harrison & McGrain for appellees.

COMMONWEALTH v. CURLEY.

Filed October 18, 1881—Not to be reported.

Appeal from Ohio Circuit Court.

Opinion of the court by Judge Hargis, reversing.

The word felonious in indictment—"It is not necessary to a charge of felony, when the word feloniously is used in stating or describing the motive of the offender, to allege that the offense was committed without the consent of the person injured by its perpetration. Consent is a matter of defense which, if it existed and shall be proven, will furnish a complete exoneration of the accused."

The indictment in this case was for cutting down and carrying away timber belonging to, and growing on, the lands of another.

P. W. Hardin for appellant.

COMMONWEALTH v. HOUSEMAN.

Filed October 18, 1881—Not to be reported.

Appeal from Graves Circuit Court.

Opinion of the court by Chief Justice Lewis, affirming.

Indictment against sheriff for negligently suffering a person charged with a felony to escape—"It is not necessarily an offense, in the meaning of the statute, for a sheriff or other officer to negligently suffer a person charged with a felony to escape from his custody. To constitute a complete offense the person suffered by him to escape must be lawfully in his custody, and it should be so charged in the indictment."

P. W. Hardin for appellant.

Boone & Stanfield for appellee.

ROSE v. BOZD, &c.

Filed October 18, 1881—Not to be reported.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Pryor, affirming.

Purchaser of portable saw and grist mill acquired no title in this case to the building in which the same was placed, or to the land on which the same was situated.

C. W. Lester for appellant.

J. & J. W. Rodman for appellees.

McDOWELL, &c. v. WISEMAN.

Filed October 20, 1881—Not to be reported.

Appeal from Estill Circuit Court.

Opinion of the court by Judge Hargis, affirming.

1. A party in ejectment must recover upon the strength of his own, and not upon the weakness of his adversary's, title.

But where such party shows a right to the possession and an equitable title, he is entitled to recover. (*Bartlett v. Borden*, 18 Bush, 45.)

2. To avoid a multiplicity of suits and stay the permanent injury to the land by the cutting and carrying away of timber the proper remedy in this case was by petition in equity and suing out an injunction.

I. N. Cardwell for appellants.

J. B. White for appellee.

COLLINS, &c. v. RICHART, &c.

Filed October 20, 1881—Not to be reported.

Appeal from Bath Circuit Court.

Opinion of the court by Judge Hargis, reversing.

1. Lien for purchase money is a lien upon the land and not upon the rents and profits.

A receiver to take charge and rent out the land was erroneously appointed in this action against an insolvent vendee, and must account to the vendee for the rents.

2. The illegality of the receiver's appointment having been judicially determined on a former appeal, evidence of improper cultivation and injury to the land, which would have been relevant on the motion to appoint the receiver in the first place, can not now operate to deprive the vendee of the rents which have accrued during the controversy and while the lands were in the hands of the receiver.

Wm. Lindsay and Reid & Stone for appellants.

J. S. Hurt and B. D. Lacy for appellees.

WARREN v. BENTON'S TRUSTEES, &c.

Filed October 20, 1881—Not to be reported.

Appeal from Bourbon Circuit Court.

Opinion of the court by Judge Hargis, reversing.

1. The liability of a surety is always to be measured by his covenant.

2. Surety of an executor can not be made liable for any other breach than that of the legal duties of the executor; and although the executor may also be made a trustee by the same will under which he acts as executor, his surety is not bound by any breach of his duties as trustee.

3. Sureties are liable in this case for the estate unascertained and remaining unsettled in the hands of the executor, as the settlement of the estate was part of the executor's duty.

A. Duvall for appellant.

G. C. Lockhart and N. P. Reid for appellees.

GIBSON'S ADM'R v. SMITHA.

Filed October 20, 1881—Not to be reported.

Appeal from Clark Circuit Court.

Opinion of the court by Chief Justice Lewis, affirming.

Reply to amended answer filed after the trial has begun—"The amended answer having been filed before the commencement of the trial, it was not abuse of sound discretion in the court to permit a reply to it to be filed even after the jury was sworn."

A receipt with the reply to the amended answer was properly allowed to be read to the jury as evidence, the reply to the amended answer having been properly filed.

G. B. Nelson and John B. Huston for appellant.

W. M. Beckner for appellee.

BERRYMAN'S ADM'R v. ADAMS, &c.

Filed October 22, 1881—Not to be reported.

Appeal from Owen Circuit Court.

Opinion of the court by Judge Pryor, affirming.

Devise to pay board, etc., of grandchildren—Where the will of the testator directs that the board, tuition and clothing of his two grandsons shall be paid for out of his estate, it is not the duty of their mother to board and clothe them at her own expense.

Srother & Orr for appellant.

J. J. Landram for appellees.

LOUISVILLE & NASHVILLE R. R. CO. v. HARRIS.

Filed October 22, 1881—Not to be reported.

Appeal from Warren Court of Common Pleas.

Opinion of the court by Judge Pryor, affirming.

1. Instructions not objected to can not be considered on appeal.

2. The verdict of the jury, the evidence being contradictory, is taken as conclusive in this case as regards the question of negligence.

John M. Porter and William Lindsay for appellant.

Halsell & Mitchell and E. W. Hines for appellee.

OFFUTT v. COMMONWEALTH.

Filed October 22, 1881—Not to be reported.

Appeal from Bourbon Circuit Court.

Opinion of the court by Judge Hargis, reversing.

1. Former conviction before the quarterly court judge may be pleaded to an indictment in the circuit court for the same offense. (78 Ky., 84.)

2. Evidence of former conviction was improperly excluded in this case from the jury.

3. Former acquittal may be pleaded in bar of an offense of the same degree.

"All injuries to the person by maiming, wounding, beating and assaulting, whether malicious or from sudden passion, and whether attended or not with intention to kill, are deemed degrees of the same offense." (Subsection 2, section 263 of Criminal Code.)

In this case the court hold that a conviction of intimidating and disturbing A may be pleaded in bar of a charge of an assault and battery upon A.

POWELL, &c. v. MEAD.

Filed October 22, 1881—Not to be reported.

Appeal from Greenup Circuit Court.

Opinion of the court by Judge Hargis, affirming.

1. Rejected amended petition not copied in record—The Court of Appeals can not know whether any error was committed in rejecting an amended petition not copied in the record.

2. Affidavit for continuance must be copied in record, otherwise the Court of Appeals "can see no abuse of discretion or infringement of law in refusing the appellants a continuance."

3. Deduction for usurious interest will not be disturbed by Court of Appeals when the evidence in the lower court "furnishes no clue to the beginning and ending of the period or periods during which more than a lawful rate of interest was charged."

4. When a party to a suit dies after giving his deposition the adverse party may give his deposition, notwithstanding the death of the other party.

D. K. Weiss for appellants.

E. F. Dulin for appellee.

DUFFY v. CASEY.

Filed October 22, 1881—Not to be reported.

Appeal from Jefferson Circuit Court.

Opinion of the court by Chief Justice Lewis, affirming.

1. Right to conclude argument in action for false imprisonment—In actions for false imprisonment or malicious prosecution the burden of proof is upon the plaintiff, and consequently he has the right to conclude the argument to the jury.

2. The affirmative plea of probable cause does not impose the burden of proof on the defendant, or give him the right to conclude the argument.

Harlan & Wilson and W. R. Abbott for appellant.

A. G. Caruth for appellee.

LEWIS COUNTY COURT, &c. v. LOVELL, &c.

Filed October 22, 1881—Not to be reported.

Appeal from Lewis Circuit Court.

Opinion of the court by Judge Hargis, affirming.

1. In a suit by a county against a sheriff and his sureties to compel them to pay to the receiver a balance of the county levy for a certain year, collected but not accounted for, the petition must state whether there are any county creditors, and if there are, that the county has paid the claims of such county creditors out of other money allowed for that year, the names of the creditors, and the amounts allowed and paid by the county.

2. The act of February 19, 1873, entitled, "An act in relation to the county levy of Lewis county and the collection of the same," is unconstitutional:

1st. As not embracing its subject in its title.

2d. "As contrary to the fundamental right to acquire and hold private property—which is above and beyond legislative control."

The second section of said act relates exclusively to sheriff Lovell, "and directs him, after he has gone out of office, to return the county court the name of all delinquent taxpayers of the county levy for the years 1871 and 1872, and the tax receipts of the same. * * * The title does not give the slightest intimation that R. B. Lovell was commanded, by the second section thereof, to render personal services and surrender his private property without just compensation."

3. "Tax receipts are private property, and legislative command can not force the sheriff to surrender them to the county court."

4. It is not the duty of the sheriff to supply a delinquent tax list abstracted from the office of the clerk.

"If the delinquent lists for 1871 and 1872 had been abstracted, lost or destroyed, there was a plain mode, pointed out by statute, of supplying them, but the legislature had no power to compel R. B. Lovell to supply their loss."

T. W. Mitchell for appellants.

E. C. Phister for appellees.

FRANK, &c. v. LACEY, &c.

Filed October 23, 1881—Not to be reported.

Appeal from Marshall Circuit Court.

Opinion of the court by Judge Pryor, affirming.

1. False representations not relied upon furnish no grounds for setting aside a sale of lands.

The agent of the owner of the lands in this case made representations from information derived from the owner, which he had reason to believe was true, but the purchaser was not influenced by these representations, but informed himself as to the value, etc., of the land, and he can not now rely upon the falsity of the representations to set aside the sale.

2. A defective title is no ground for rescinding a contract and conveyance of land held in possession under a deed of general warranty where there has been no eviction, and no hostile claim asserted.

3. Coverture of the wife can not be relied on by the husband to avoid a deed accepted by the wife to land for which she paid the purchase money, either as the agent of her husband or in her own right, the husband himself being a party to the deed.

Acceptance by the wife is an acceptance by the husband in such a case.

4. Entry upon and taking possession of the land was equivalent to an acceptance of the deed in this case.

5. A married woman's land may be subjected to the payment of her vendor's lien for purchase money.

Gilbert & Reid and L. D. Husbands for appellants.

Petrie & Little for appellees.

FLETCHER v. HARL, &c.

Filed October 25, 1881—Not to be reported.

Appeal from Meade Circuit Court.

Opinion of the court by Judge Pryor, affirming.

1. A voluntary conveyance is not fraudulent as to subsequent creditors, and although it was not recorded the plaintiff is not prejudiced until he has shown a state of case making it fraudulent as to such subsequent creditors.

2. An unrecorded deed, as to creditors and purchasers with notice, is as valid as if it had been recorded.

R. L. Stith for appellant.

Lewis & Fairleigh for appellees.

WILLIAMS, &c. v. WALTERS' GDN, &c.

Filed October 25, 1881—Not to be reported.

Appeal from Clark Circuit Court.

Opinion of the court by Judge Hargis, reversing.

1. Liability of sureties in administrator's bond for rents—"The sureties in an administrator's bond executed in pursuance of the form prescribed by section 9, article 2, chapter 39 of the General Statutes, are not responsible for the rent of land accruing after the intestate's death." (Wilson v. Unself, 12 Bush, 219.)

2. Defect of parties first suggested in Court of Appeals avails nothing in this case.

"Before the judgment was rendered the necessary parties were joined in the action, and the defect of parties which the appellant had failed to take advantage of, either by demurrer or plea, can not be made a ground of objection which is raised for the first time in this court."

3. Administrator in default suffers no peculiar hardship or injustice by being refused interest on his five per cent. commissions allowance before the final settlement of his accounts with the commissioner.

4. The administrator who has the use of the sum allowed to him, and has, therefore, realized the interest on it, has no just claim to interest.

Thos. Turner and B. J. Peters for appellants.

W. M. Beokner for appellees.

MERIWETHER v. TUCKER.

Filed October 25, 1881—Not to be reported.

Appeal from Franklin Court of Common Pleas.

Opinion of the court by Judge Pryor, reversing.

1. A settlement by sureties of a debtor is held to be binding upon such debtor.

In this case Meriwether leased a hotel to Tucker, and took bond with sureties for the rental. Tucker failing to pay the rental as agreed, his sureties made an agreement with Meriwether whereby they paid a sum of money and agreed that the lease should be cancelled, and possession surrendered. In pursuance of this agreement Tucker surrendered possession, and thereafter sued Meriwether for claims growing out of the lease, which he contended were not adjusted or settled by his sureties in the agreement to rescind the lease. Held—That Tucker, by surrendering possession, in pursuance of the agreement made by his sureties, constructively accepted its terms, and, therefore, was not entitled to recover on the claims asserted by him.

Ira Julian for appellant.

J. & J. W. Rodman for appellee.

DEAN v. SKINNER'S ADM'R.

SAME v. SAME.

GAITSKILL'S EX'OR v. WILSON.

SKINNER'S ADM'R v. GAITSKILL'S EX'OR.

SAME v. STEVENSON.

Filed October 27, 1881—Not to be reported.

Appeal from Clark Circuit Court.

Opinion of the court by Judge Pryor, affirming, except on cross appeal of Skinner's Adm'r v. Gaitskill's Ex'or.

1. The opinions of neighbors as to the insolvency of a debtor, and as to his motives in disposing of his property, were competent evidence in this case.

2. Preference of creditors by insolvent debtor is constructively fraudulent—Presumption as to Design—"If the debtor knows that he is insolvent he must be presumed to know that to secure one creditor in preference to another is constructively fraudulent, and he must be taken to have designed that which necessarily follows from his own actions.

3. Obligor in a note is not estopped from making a defense against it when sued by an assignee thereof, by a statement made by him to such assignee that he expected to pay the note at maturity, when both parties were ignorant of the defect in the title to the land for which it was executed.

W. M. Beckner for Skinner's administrator.

B. J. Peters and C. Eginton for Dean and Gaitskill's executors.

C. Eginton for Stephenson.

T. S. Tucker for Wilson.

LUSK, &c. v. MILLER.

Filed October 29, 1881—Not to be reported.

Appeal from Garrard Circuit Court.

Opinion of the court by Judge Pryor, reversing.

1. Mere inadequacy of the price bid for an infant's land, unless it amounts to a sacrifice of the property, will not authorize the chancellor to deprive the purchaser of the benefit of his purchase.

2. Where the purchaser prevents others from bidding at the sale of an infant's land, by disparaging the title, he will not be allowed to retain the land for which he paid an inadequate price.

R. H. Tomlinson for appellants.

W. D. Hopper for appellee.

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CHIEF JUSTICE M. H. COFER.

Martin Hardin Cofer took his seat upon the bench of the Court of Appeals of Kentucky in September, 1874, having been elected from the third appellate district to succeed the late Judge Mordecai R. Hardin. He was in the forty-second year of his age, and had been on the bench as circuit judge from February 15, 1870.

He died in office March 22, 1881, having served less than seven years of his term. His reported opinions will be found in 10th to 14th Bush and 78th and 79th Kentucky. It is proposed in this paper to show what was the quality and character of his labor in the office of appellate judge. No attempt will be made to give a general sketch of his life, and no endeavor to depict his character except as they both were shown in that office. The writer only knew him while he was an appellate judge, and then had only the acquaintance that a lawyer has with those before whom he is called upon to try his causes. As he thus appeared, Judge Cofer was a conscientious, laborous, painstaking, ambitious man. His life seemed to be bound up in the performance of the special duty that was assigned to him by virtue of his office and the law under which it was created and held. He seemed anxious to excel in this particular sphere of labor, and so far as could be discovered from his conduct on the bench or freer conversation off of it, he had no desire for other employment or place. Without polit-

ical aspirations, without desire for power or influence. he seemed to be constantly striving for one single end, and that was to ascertain the very law of the causes heard by him, and to declare and apply it without favor to any suitor or fear of any consequences. He had a strong and never-to-be-satisfied desire to make an enduring name as a sound and correct expositor of the laws of Kentucky; not the laws of Kentucky as they should be; not a dispenser of hap-hazard "justice," so-called; not a "brilliant" judge; not the writer of eloquent, or sarcastic, or scathing, or "equitable" opinions; not oppressed by the "expansive genius of the common law," or carrying on his shoulders the weight of "American or Republican institutions." It was all well enough for Lord Mansfield to silently and stealthily build up the beautiful fabric of the *lex mercatoria*, and as needs were to seek for his materials where the wealth of a Rothchild was considered as of at least equal importance with a piece of sod. But in these days Judge Cofer thought there were precedents enough to find out what the old laws were and legislatures enough to make new ones. So that when he did not know what the law of a given case was, it was his habit to do his best to find out what good author did, and having found it written down for him, to so declare it.

In considering the amount of his work, it is to be noticed that only a limited number of the decisions of our court of last resort appear in the published reports. Without great labor, therefore, it is impossible to say how many opinions Judge Cofer delivered. Looking at the printed volumes alone, and passing by 10 Bush, his first opinion in which appears, on page 234, the following statement of the number of reported cases in each volume, and the number of opinions delivered by him may be of interest.

In 11 Bush there are 112 reported cases, and of Judge Cofer's opinions there are 32. In 12 Bush there are 138 reported cases, and of Judge Cofer's opinions there are 33. In 13 Bush there are 134 cases, and of Judge Cofer's opinions 43. In 14 Bush there are 127 cases, and of Judge Cofer's opinions 37. In 78 Kentucky there are 128 reported cases, and of Judge Cofer's opinions 48. This statement is not to be taken as a

comparative one. In estimating the number of cases reported, the tables of cases have been used, while in finding out the number of opinions delivered by Judge Cofer an actual count has been made. To show the difference, it may be observed that one opinion in 12 Bush applies to 19 cases.

Turning now to what the opinions are, the following have been taken as the most interesting and important, although every Kentucky lawyer will no doubt miss some case that he thinks should have been included. The limits of such an article as this requires that only a few be selected.

The first case decided by Judge Cofer is reported 10 Bush, 235, and holds, reversing the judgment of the lower court, that an action against an heir or devisee upon the contract of his ancestor or testator, is not barred by time, unless it would have been barred against the decedent; that such an action is not one created by statute, and so within the five year limit, nor a case of relief unprovided for and so within the ten year limit.

In *Elizabethtown, Lexington and Big Sandy Railroad Company v. Combs*, 10 Bush, 384, he expounded the doctrine of liability of railroads occupying streets of a city to the owner of abutting property, and held that while the mere use of the street "as a site for a railroad track does not give a right of action to owners of adjacent lots, unless it materially hinders the ordinary use of the street," yet, "where such use of the street does unreasonably abridge the right of lot owners to use the street as a means of ingress and egress, an action will lie against the person or corporation guilty of usurping such unreasonable and exclusive use of streets for the recovery of such immediate and direct damages as the owner may sustain, and further, that the injury being permanent in its character, a single recovery may be had for the whole injury to result from the acts complained of."

In *Harper v. Harper*, *Ibid.*, 458, he delivered a learned opinion on the subject of defensive pleadings in an action for slander. The rules are thus summarized: "The rule under the Code, then, seems to be, that the defendant may, if he chooses, deny the speaking of the defamatory matter charged, and in a

second paragraph he may admit the publication and allege its truth; and in still another he may admit the words and without alleging them to be true or admitting that they were false, justify by alleging such facts as are relied on to excuse their publication." These rules will, it is believed, meet the ends of justice. But if, by admitting the publication, is meant an express admission, it is a little difficult to see how a conscientious man can admit that he said a thing which he did not in fact say, and looking at the third supposed paragraph, and remembering that each paragraph stands by itself and that every material-allegation in a petition not denied is admitted, how can a defendant, responding to a petition that charges him with speaking certain words which are false, neither allege their truth nor admit them to be false?

Jones v. Johnson, Ibid, 651, is a careful opinion showing what are the rights and remedies of stockholders as against directors guilty of misfeasance in office, where the corporation or its assignee refuses to sue.

In Collins v. Henderson. 11 Bush, 77, he showed his devotion to common schools by an opinion that carefully guards the funds provided for their maintenance from being diverted in any way from the object for which they were designed.

Gaar v. Banking Co., Ibid, 181, settles for Kentucky the question upon which courts have so widely differed as to the effect upon the negotiability of a note of an agreement to pay an attorney's fee if resort is had to the courts for its collection, and holds that, as the sum is certain at maturity, any subsequent uncertainty can not affect the mercantile character of the paper.

In the same volume, 503, is reported the celebrated case of L. & N. R. R. Co. v. Fox, where, Judge Cofer, delivering the opinion, the court set aside a verdict of \$85,500 for personal injury, not resulting in death, as manifestly excessive. In the course of his opinion, he states that the largest verdict in such an action, to which the attention of the court had been called, was one for £5,250. Since then, in a peculiar case, the court of appeal in England has set aside a verdict for £7,000 as manifestly too small, and affirmed a second verdict of £16,000 in the same case as not too large.

In *Sloan v. Gilbert*, 12 Bush, 51, he held that a defendant to an action for slander in speaking words imputing a felony, is only required to prove their truth by a preponderance of evidence and not beyond a reasonable doubt.

In the same volume, page 110, is an opinion of his holding that the legislature could not grant to "The Winchester Building and Accumulative Fund Association" the special privilege of lending money at a higher rate than such as was fixed by the general usury law. Such a grant was held an infringement of the first section of the Bill of Rights, which declare that "all free men when they form a social compact are equal and that no man or set of men are entitled to exclusive separate public emoluments or privileges from the community, but in consideration of public service." The doctrine of this case has had a curious sequel. A corporation was sued on a note bearing fifteen per cent. per annum interest, to be compounded monthly, plaintiff relying on a clause in defendant's charter that allowed it to borrow money at any rate for which it might be compelled to stipulate. Defendant insisted that according to the laws of interest as laid down by Bentham, he who could borrow most freely could borrow cheapest; that usury laws were an evil that visited themselves not on the lender but the borrower, and hence that this claim was a special privilege and so unconstitutional.

The lower court held for defendant, and on appeal the Court of Appeals was equally divided. Whatever, therefore, may be said of the rule in the principal case, it has the merit of working both ways.

In *Moran v. Moran*, 12 Bush, 301, Judge Cofer wisely construed the statute authorizing the empowering a feme covert to trade as a feme sole as not embracing a case where the sole ground for the application was that the husband was insolvent. The sound policy of this decision can best be shown in his own language. "The statute does not specify the grounds upon which the extraordinary power may be conferred upon married women, but says the court may confer it 'on satisfactory evidence,' which we understand to mean upon satisfactory evidence of the necessity and propriety of doing so, and we do not regard the simple fact that the husband is insolvent as

showing that it is either necessary or proper that his wife should be empowered to trade as a single woman. The learned judge below was not satisfied nor are we that this application was not made with the intent to hinder and delay the husband's creditors, or that they would not be injured by granting the relief sought.

"The insolvency of the husband does not disable him to support his family, and our liberal exemption laws secure to him against his creditors all that is necessary for reasonable comfortable living, and all that he may be able to earn beyond the exemptions should go to his creditors; and the court ought not, by conferring upon his wife the power to trade as a feme sole, to give him an opportunity by acting as agent for her to place his own earnings beyond their reach."

His opinion in *Judge v. Braswell*, 13 Bush, 75, determined an important question of commercial law. There a firm had been formed for the purpose of mining certain lands, and buying and selling other mineral lands. The articles of partnership embraced an agreement that neither of the partners should incur a debt for the firm without the consent of the others. One of the partners did incur a debt for land purchased for the firm, but this was done without the knowledge of another. Held the latter not liable. "In non-commercial partnerships one who seeks to hold the firm bound upon a contract made by a single member, must be able to show either express authority or that such is the custom and usage of that particular branch of business in which the firm is engaged, or such facts as will warrant the conclusion that the partner has been invested by his co-partners with the requisite authority, the distinction being that, in commercial partnerships, the extent of a partner's powers to bind the firm is a question of law, while the power of a partner in a non-commercial firm to bind his co-partners is a question of fact. Thus, the business of a commercial partnership being ascertained, and the nature of the contract made by a single member, and the circumstances attending it being known, the court may generally determine, as matter of law, whether the contract was within the scope of the implied powers of a partner. Not so, however, in reference to a contract made by a member of a non-commercial partnership. A partner in

such a partnership does not generally possess power to bind the firm, and consequently the extent of his power is not fixed by the rules of law, but each case is left to be decided upon its particular facts; and in all such cases, in order to make out the liability of the firm, it ought to be made out affirmatively by the plaintiff that the partner had no power to make the contract in question."

In *Warfield v. Brand's Adm'r*, *Ibid*, 84, he expounded the law relative to the powers of administrators *de bonis non* with the will annexed, as fixed by the statutory provision that "an administrator with the will annexed shall possess and exercise all power and authority, and shall have the same rights and interest, and be responsible in like manner, as the executors therein named or any of them." The question was as to the right of such an administrator to a fund which the testator had directed his executors to raise, set apart and hold for the benefit of his wife. After showing that certain duties and powers imposed upon and vested in executors are executorial, and certain are of a general fiducial character, that by the act of 1838 the bond of an executor and administrator with the will annexed, must contain, in addition to the conditions theretofore prescribed by law, a further condition that the executor or administrator with the will annexed, would well and truly pay over and deliver all goods, chattels, moneys, and other property which should come into his hands as executor or administrator as aforesaid to such persons as should be entitled to the same by law or the provisions of the will; and that he would faithfully perform and execute all trusts and powers with which he was invested by the provisions of the will, he proceeds as follows:

"That act continued in force until superseded by the Revised Statutes, in 1852, when some changes were made in the covenants required of executors and administrators with the will annexed.

"The bond there prescribed omitted, among other things, the covenant to faithfully perform and execute all trusts and powers created or conferred by the will, but contained a covenant to well and truly administer, according to law, the proceeds of the sale of any estate which the will empowered him

to sell, thereby securing the proceeds of land sold by an executor or administrator with the will annexed.

"The provisions of these statutes respecting executorial bonds, seem to us to indicate an intention on the part of the legislature to extend the limits of strictly executorial powers and duties; and we think we ought, in furtherance of that intention, to treat all those powers and duties conferred and imposed by the will, the faithful exercise and performance of which are secured by the executorial bond, and which pertain to the settlement of the estate and the ascertainment of the net amount and its distribution, according to the usual course of administration, among those entitled to it, as legal executorial powers and duties, and all others as trusts. By such a construction we avoid complications and establish a standard which, though it may not conform to the doctrines of the common law, will have the greater merit of uniformity and simplicity.

"There may be other powers and duties besides those above enumerated, which, under the rules of the common law, were regarded as trusts not pertaining to the office of executor, which, under the statute, would devolve on an administrator with the will annexed; and we are not certain that any general rule, applicable to all cases, can be safely laid down. But we think we hazard nothing in saying that, when the faithful exercise of the power or performance of the duty is not secured by the form of bond prescribed by the statute and the power or duty does not relate to the settlement of the estate and its distribution according to the ordinary course of administration, and especially where the estate, after being otherwise ready for distribution to those in interest, is required by the will to be held in the hands of the executors, upon trusts which may extend over a long period, and from their character must be presumed to have been made by the testator because of his personal confidence in the fitness of his executors for the discharge of the duties imposed, such power or duty will not pass under the statute to an administrator de bonis non, with the will annexed.

"In such a case application should be made to the chancellor for the appointment of a trustee to execute the trust.

"The statute was no doubt enacted solely to facilitate the settlement of estates, and we are unwilling to believe that the legislature intended to go beyond what was necessary for that purpose, and to confide to administrators *de bonis non* those delicate and responsible trusts which testator's sometimes confide to their chosen executors. Powers are sometimes confided to executors, or, more properly, to the persons filling the office of executor, as a trustee, which are so delicate, and of such a nature, that even the chancellor can not execute them. Yet if the construction contended for by the appellee be adopted, the legislature has, by a dogmatic statute, conferred power for that purpose upon an administrator with the will annexed."

It was accordingly held that the administrator was not entitled to the fund. There are few opinions in the books of more importance than this. The popular idea seems to be that all the duties imposed on the executors of a will are executorial and covered by his bond, and pass to his successor in the office. But this case clearly shows how false is such a notion, and that those very duties which are the most important, and in the execution of which such confidence is reposed, and by reason of which the executor's control is longest extended, are of a general fiducial character, not secured by the bond, and to be taken charge of by the chancellor and not the county court.

In *Blakey v. Johnson*, *Ibid.*, 199, he applied a rule of law that is just enough in itself, to a case which is hardly fitted. There a note was drawn as follows:

Twelve months after date we or either of us promise to pay Thomas Johnson five hundred dollars for value received, with ten per cent. interest from date.

September 11, 1874.

WM. ATKIN,
C. H. BLAKEY.

The paper being a "commercial note" and, as is apparent, with the word "date" alone on one line, September 11, 1874, alone on the next, and then on the third the first signature. This note was altered after Blakey signed it by inserting the words "interest to be paid semi-annually" immediately after and on the same line with the date. The alteration was held to be a material one, but not to discharge Blakey because of

his negligence in leaving the line open. It is submitted that few notes are so written that they might not be altered in some material way without doing anything more than filling some space not written on, and that to hold the above blank the result of negligence, is to set up a standard of prudence far higher than that to which even business men attain.

In *Farmers & Drovers Ins. Co. v. Curry*, Ibid, 812, he held that the provisions of the act of February 4, 1874, to the effect that "all statements and descriptions in any application for a policy of insurance shall be deemed and held representations and now warranties, nor shall any misrepresentation, unless material or fraudulent, prevent a recovery on the policy" could be avoided by a stipulation to that effect in the policy. While this is not the law, it is a pity that the courts should ever have so held, as by means of such a principle, beneficent legislation is constantly nullified.

In *Greer v. Church*, Ibid, 431, he held that an instrument of writing by which Church purported to "rent" to Martin a piano valued at \$550 for \$400, rent received the first month and \$10 per month for six months thereafter, and \$20 per month thereafter, with a privilege of purchase at \$550, crediting the rent paid, was a sale.

In 14 Bush, 1 Ray *v. Sweeney*, he examined the doctrine as to "ancient lights" as established in England and after showing that the authorities in its favor were "post-revolutionary," held them not binding on our courts, and decided that a mere user of light for fifteen years did not establish a right to prevent the erection of a building that would obstruct it. The opinion is an excellent example of Judge Cofer's thoroughness in a search for sound legal principle.

In *Mercer's Adm'r v. Mackin*, Ibid, 434, his opinion holds that unless a will is clearly shown to have been fraudulently suppressed, its existence and contents can not be proved by testimony as to the declarations of the testator upon the subject. The case was, in its facts, one that strongly appealed to so just a man as Judge Cofer to bend the law, but, in this, as in all other respects, he was an inflexible judge.

In *Varble v. Ripley*, Ibid, 700, he held that the proprietors of a tow boat were not common carriers.

The next opinion that will be noticed in this volume, *Sawyer, Wallace & Co., v. Taggart*, page 728, is one of the best of Judge Cofer's decisions upon commercial questions. The case involved dealings upon margins, and in few classes of questions is there so much confusion of thought as in this. The learned judge makes a careful analysis of such contracts and shows that while they may be put to a use which is hurtful to the community, yet it would be ruinous to legitimate trade to declare them all illegal. The opinion is well summarized in the syllabus.

"1. Contracts for the sale of goods to be delivered at a future day are not invalidated by the circumstance that, at the time of making the contract the purchaser intends to resell before the time for the delivery.

"2. Contracts for future delivery, entered into without any mutual agreement, tacit or express, that they are not to be performed by delivery of the goods and payment of the price, are valid, and no subsequent agreement to settle them by the payment of differences can render them invalid.

"3. The fact that the purchaser for future delivery intends not to receive and pay for the goods, but to resell them before the date of the delivery, furnishes no ground for holding that, it was tacitly understood, the contract was not to be performed and was to be settled by the payment of differences.

"4. A purchase of goods for future delivery—through a commission merchant by depositing a margin—who orders a resale before the contract time for delivery, is liable for all losses thereby sustained.

"5. A gaming contract is one in which it is agreed or understood in the beginning that the thing dealt for is not intended to be delivered, but that the parties are to settle their mutual wagers on the price, by paying the difference between sales at different times.

"The contracts in this case are held to be valid."

In *Couchman v. Maupin*, 78 Ky., 85, he held that an execution on a judgment recovered on a note signed by all the members of a firm can be levied on partnership property, and that such property can be sold thereunder, and that partnership creditors can not intervene, because they have no lien except where they can derive it through the partners.

In *Yeager v. Groves*, Ibid, 278, he decided that an attachment which did not run in the name of the Commonwealth was void.

In *Greenwell v. Haydon*, Ibid, 333, he examines the question as to the title to negotiable paper acquired when overdue and shows that not only is the purchaser subject to all equities and defenses that would be good against the real owner as against the maker, but that the title of such purchaser is subject to be defeated by that of any one who has one that is good against his vendor. This is also the judgment of the Supreme Court of the United States, *Vermilye v. Express Co.*, 21 Wallace, 188, although curiously enough, this case is not cited.

In *Taylor's Adm'r v. Pennsylvania Company*, Ibid, 348, he delivered the opinion of the court, holding that an administrator appointed in Kentucky could not maintain an action for the death of his intestate caused by negligence of the defendant in Indiana, although such an action was allowed by a statute of that State. This is opposed to the view recently taken of this subject by the Court of Appeals of New York and the Supreme Court of the United States. (*Dennick v. R. R. Co.*, 103, U. S.)

Turning from civil to criminal cases, the following of the latter class may be noticed as of special interest:

In *Coffman v. Commonwealth*, 10 Bush, 496, it appears that the prisoner was convicted of manslaughter, and sentenced to the penitentiary for eight years. Among other errors assigned was in giving the following instruction: "The court instructs the jury that though they may believe the death of Harrison was caused by the surgical operation; yet if the operation was performed by physicians as a remedy for the wounds inflicted by the defendant, they can not acquit him on that ground."

On this Judge Cofer comments as follows:

"We can not approve this as a principle of the law of the land. The mere fact that the operation was performed by physicians as a remedy for the wounds inflicted by the appellant, without any reference to the question whether such an operation was reasonably deemed to be necessary, or was performed by men of ordinary skill as surgeons, or in an ordinarily skillful manner, can not render the appellant legally responsible for the death of Harrison, if, in fact, the operation, and not the injuries inflicted by him, caused his death.

"The rule deducible from the authorities seems to be that, where the wound is apparently mortal, and a surgical operation is performed in a proper manner, under the circumstances which render it necessary in the opinion of competent surgeons upon one who has been wounded by another, and such operation is itself the immediate cause of the death, the person who inflicted the wound will be responsible. (*Commonwealth v. McPike*, 3 Cushing, 181; *Parsons v. The State*, 21 Ala., 300.) But if the death results from grossly erroneous surgical or medical treatment the original author will not be responsible. (21 Ala., 300.)

"It should, therefore, have been left to the jury in this case to say, whether the operation performed on the deceased was such as ordinarily prudent and skillful surgeons, such as were to be procured in the neighborhood, would have deemed necessary, under the circumstances, in view of the condition of the patient, and whether it was performed with ordinary skill; and they should have been told that if they found the affirmative of these propositions, the appellant was responsible, although the operation, and not the wound inflicted by him, caused the death; but that if they found that the operation would not have been deemed necessary by such ordinarily prudent and skillful physicians and surgeons, or it would have been deemed necessary and was not performed with ordinary skill, and the death resulted from the operation, and not from the injuries inflicted by the appellant, they ought to acquit him, even though they might believe such injuries would eventually have proved fatal.

"For the errors indicated the judgment is reversed, and the cause is remanded, for further proceedings not inconsistent with this opinion."

In *Wilson v. Commonwealth*, *Ibid*, 526, he dismissed the appeal of Wilson, who, having been convicted of murder and sentenced for life, had escaped from custody, holding that the court could not entertain a case where it was without power to enforce a judgment.

Brady v. Commonwealth, 11 Bush, 283, is interesting as a problem how a jury, to whom it was proved that "Brady and deceased met on Fifth street just before deceased was shot; that he there shot at the appellant, who ran down the street

toward Limestone street; the deceased and his wife then walked along the same direction in which appellant had gone, and when they reached Limestone street the deceased was shot in the back by some unseen person," could find Brady guilty and fix his punishment at only two years in the penitentiary.

The court affirmed the judgment.

In *Nichols v. Commonwealth*, Ibid, 575, the appellant had been convicted of murder and sentenced to be hung. The court affirmed the judgment, and, in commenting among other things upon the following instruction, "Malice, in the legal sense, denotes a wrongful act done intentionally without just cause, and is implied by law from any deliberate cruel act committed by one person against another, however suddenly done," held that while the first clause was inaccurate in making "malice" denote "an act," instead of a special kind of act denote malice, it was not prejudicial, and that the residue of the instruction was in accordance with a long recognized and until recently universally accepted rule of the common law."

The case of *Commonwealth v. Jackson*, Ibid, 680, was an appeal to settle the question as to whether, on an indictment for bigamy, the marriage of the accused to either wife could be proved by his declarations and conduct. Judge Cofer examines the question carefully, and decides that it can, thus disregarding the rule in Massachusetts, New York and Connecticut, and adopting that of South Carolina, Virginia, Georgia, Alabama, Ohio, Pennsylvania, Maine and Illinois, the weight of numbers as well as reason. As, however, the court had not thought so the Mormon got off.

The case of *Commonwealth v. Davis*, 12 Bush, 240, appellee was indicted for "giving" spirituous liquor to a minor. The evidence showed that he and Rison, the person to whom it was charged that he gave the liquor, were aged respectively sixteen and seventeen years; that, desiring to purchase some whisky, each furnished a part of the money; that the appellee, in the absence of Rison, procured whisky and when they met next day gave some of it to Rison, who drank it. Judge Cofer held that Davis should have been convicted; that the word "give" in the statute meant to furnish or supply, and not merely to bestow.

In 18 Bush are three opinions, reversing judgments of conviction in cases of manslaughter, the first, page 250, being that of Terrell, convicted of the manslaughter of Harvey Meyers.

In 14 Bush, 342, he reversed a judgment of conviction against Grove Kennedy, but a new trial having been had, and a second conviction, this was affirmed by another opinion, delivered by the same judge, in 78 Kentucky, 448. The judgment of reversal seems entirely correct, although the question was narrow.

In 14 Bush, 769, *Temple v. Commonwealth*, he reversed a judgment of conviction because the prisoner was not called in to hear the verdict.

Judge Cofer rarely dissented. His longest dissenting opinion is that to the opinion of the court in *Douglass v. Cline*, 12 Bush, and occupies forty pages.

The most striking reflection in this review of Judge Cofer's life-work, for so it must be regarded, being all that he has left to posterity, is its narrow compass. Here is the work of seven years, and it can be printed in two ordinary volumes. And these were not to him an ordinary period of seven years. They covered an amount of intellectual labor that many men could not have accomplished in a whole life-time. Nor did he seem to be specially quick. His capacity for work was immense, and his industry untiring. With the record he became fully and thoroughly acquainted. He mastered it in all its details, and his desire to consider and respond to every argument that was addressed to him, which, while affording the highest proof that he had fully considered a case, at times extended his opinions to a useless length. So it will be found that he delivered an unusual number of responses to petitions for rehearing; thus showing a second deliberate consideration of the case in hand. In his dealings with the bar, Judge Cofer was uniformly courteous and obliging. He was never impatient or petulant, and showed a temper as well-poised and even as his mind. Of course, the first requisite for a good judge is patient honesty. This Judge Cofer had in a remarkable degree. He was not only honest in the ordinary sense of not making any difference between lawyers and suitors for personal favor, but he was honest with himself. He considered his

causes calmly, and seemed to deliberately ask himself questions and do his best to correctly answer them. His opinions show that he indulged in no sophisms, and, while you might think him wrong in his conclusion, yet you could not doubt that he believed his reasoning as well as the result of it to be correct. As he never imposed on himself, so he never imposed on any one else. This may seem very common praise. But it is certainly true, that many judges who honestly believe that they have reached a correct conclusion, the justice of the case in hand will bring to their aid in its defense arguments which they could answer themselves, and instead of fairly admitting that certain precedents are opposed to them, and plainly and openly disregarding them, attempt to bind themselves and their readers to their force by unsound and unmeaning distinctions. Many of the friends of Judge Cofer believe that he paid with his life the penalty of an impossible task. Complaints have been made, from time to time, that our highest court was too slow, that it was behind with its work, and that its docket was falling more into arrears every year. It is undoubtedly true that our Court of Appeals does not decide in proper time the causes that are brought there. The delay of justice in Kentucky, amounts, in many cases, to a denial of it. But is this the fault of the court? In 24 Albany, L. J., 222 (September 17, 1881), will be found some instructive statistics on this subject. It appears that the Supreme Court of West Virginia decides between 50 and 60 cases a year; the Supreme Court of Virginia from 75 to 100; the Supreme Courts of Ohio and Massachusetts each from 200 to 250; the Supreme Court of the United States and of Pennsylvania each from 250 to 300; the Supreme Court of Illinois and the Court of Appeals of New York from 350 to 400. The court of the first is composed of three judges, that of the second of five judges, that of the third of five judges, of the fourth of seven judges, of the fifth of nine judges, of the sixth, seventh, and eighth each of seven judges. All of them, except West Virginia, and Virginia, of which I am uncertain, require the records to be printed. Now in September, 1881, there were on submission to our court 400 causes, and on the docket for hearing at the term ending January 1, 1882, about 500 more, making, say

900, manuscript records to be examined, and the questions involved to be decided in four months. And this with four judges. Such a task is utterly impossible, and no officer, however conscientious, should feel bound to sacrifice himself to so vain an endeavor.

In conclusion, the State of Kentucky has suffered a loss in the death of Judge Cofer that will not soon be repaired. A just judge, an upright man, a patriotic citizen, his name will be known and praised as long as our Commonwealth shall exist.

ALEX. P. HUMPHREY.

CAMPBELL v. GOLDEN, &c.

(Filed November 8, 1881.)

1. Reasonable compensation to guardian for services is not limited, arbitrarily, to 5 per cent. on disbursements where services are rendered, not only in managing and disbursing money of his ward, but by personal care and custody of the ward, whose nurture and education have been confided to him.

2. Board and services of ward—Guardian should have been credited with board and charged with value of services of ward in this case.

3. Reasonable expenses in collecting money loaned by guardian—In this case guardian loaned money of his ward to nonresidents at 10 per cent., and incurred expenses in abortive attempts to collect it. His allowance for such expenses is limited to excess of interest over the legal rate.

4. Where guardian makes 10 per cent., his allowances for money paid and services rendered should be made as of the date of payment and rendition of the services, and interest charged to him at 10 per cent. on the remainder after deducting the credits.

5. Principal estate of ward may be applied for the payment of advancements made by the guardian in furnishing food, raiment, shelter, and education suitable to the condition of the ward, under circumstances set forth in the opinion herein.

Appeal from Knox Circuit Court.

Opinion of the court by Judge Hargis.

When Celia Gibson was but eighteen months old her mother died, leaving her homeless and without a protector.

The appellant was immediately appointed and qualified as her guardian.

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He at once took custody of his ward and collected the sum of \$328.27, which descended to her from her grandfather, and was all the estate she owned.

It appears that Celia was subject to the diseases incident to childhood, and at times exceedingly cross and fretful, which made it necessary for appellant to hunt new homes for her, as the neighbor women whom he had employed to clothe, feed and care for her became weary of their charge.

A Mrs. Pope kept her longest, at \$25 per year.

When she became old enough to attend school he sent her to all the common and subscription schools taught in the neighborhood; boarded, clothed and treated her well at his own home from the time she was twelve years old until her elopement and marriage with her co-appellee in the year 1871, which was her seventeenth year.

During the whole period of her wardship he made advancements to defray the expenses of her maintenance and education as her necessities demanded.

His daughter was about the same age of Celia, and their treatment was so much alike, no difference was discovered by any of the witnesses.

On several occasions he evinced deep solicitude for her wellfare by riding on horseback twenty miles to see her.

In the incipency of his duties he loaned \$300 of her money at ten per cent. interest per annum, and annually collected the interest until the year 1870.

The interest was insufficient to maintain her, and hence he made the needed advancements.

He was subjected to considerable expense and trouble in an abortive effort to collect the principal of the fund he had loaned, by reason of the nonresidence of one of the borrowers and the insolvency of the other, but was refused, by the judgment, any credit for service or expenses incurred on that account.

As he had caused the money to yield ten per cent. per annum, and subjected himself to personal responsibility for the loss of the principal by contracting for a usurious rate of interest with a nonresident, the court should have allowed him

the reasonable expenses and value of his personal services, not more, however, than the excess of interest beyond the legal rate.

He was allowed \$39 for his services devoted to her personal safety, sustenance, education and social elevation, from the cradle to the marriage altar, whither her husband, now dissatisfied with appellant's conduct as guardian, carried her against the latter's consent.

This allowance was not reasonable, under the circumstances of this case, and there is no law which arbitrarily confines the allowance to the sum of five per cent. on disbursements, where the services of the guardian are rendered, not only in managing and disbursing the money of his ward, but by personal care and custody of the ward, whose nurture and education have been confided to him.

Section 11, article 2, chapter 48, General Statutes, provides that "the guardian, besides all necessary disbursements and repairs, shall be allowed by the court a reasonable compensation for his services."

In the light of the evidence, \$100 is barely reasonable compensation for his services. The court ought to have allowed him that sum.

While boarding with appellant she rendered some services which were an advantage to her by reason of their light character and the training in household duties that their performance gave to her; but she should be allowed their value which, according to the evidence, could not have exceeded one-half the value of her board. The appellant should have been credited with her board and charged with her services at the rate stated.

He was charged with ten, but only allowed six, per cent. interest on the expenditures, board advancements, etc., made by him.

There was no reason for charging the guardian with interest upon interest in biennial rests, as no balance was owing by him at the end of any year after his appointment, which he had not loaned out.

None of her money remained in his hands for as much as one year, as it must have taken, according to the evidence, the

\$28.27 not loaned out by him, to clothe and care for Celia the first year of his appointment.

He should have been credited with the sums he was entitled to, as of the date of payment, or from the time of the rendition of services, and interest charged to him at ten per cent. on the remainder after the deduction of credits. Section 10, article 2, General Statutes.

It is insisted that the principal of her patrimony, although it is personal estate, can not be applied for the payment of advancements made by the appellant in furnishing her food, raiment, shelter and education suitable to her condition.

It is true that the first clause of section 9, article 2, chapter 48 of the General Statutes, forbids the allowance of any disbursements to the guardian for maintenance and education beyond the income of the estate, but the second exception thereto embraced in the same section, authorizes the judicious and proper application of the principal of the ward's personal estate to his board and tuition, when it is best for the ward to so use it.

And so the principal of the personalty may be used when the ward is of such tender years or infirm health that he can not be apprenticed or no suitable person will take him as an apprentice.

To this may be added that the 11th section named above directs an allowance to the guardian for all necessary disbursements.

These provisions are intended to embrace such a case as we conceive this one to be, and to protect from want or ignorance wards with small personal estates.

The expenditures and advancements by the appellant were judiciously and properly made for necessaries, board, and education of his ward, whom he fitted for the sphere in which she moves. And if it should become necessary, upon a settlement of his accounts according to the principles herein indicated, to apply the whole of the principal of her estate in his hands to reimburse him, he is entitled by law to have it done.

It was held, in the case of *Jarret v. Andrews, &c.*, 7 Bush, 814, that "where necessary to the proper maintenance and

education of the ward or for the payment of debts," the chancellor would direct the sale of an infant's real estate, or reimburse the guardian by the sale of real estate for advancements which the chancellor would have authorized had he been applied to before they were made.

And it is plain the statutes are more stringent against the sales of real estate to reimburse guardians for advancements than they are against the appropriation of personalty for such a purpose.

This distinction was put in the statutes because of the difference in the nature of personal and real estate.

Wherefore, the judgment is reversed, and cause remanded with directions to render judgment in conformity to the principles of this opinion.

W. O. Bradley for appellant.

Dishman & McClary for appellees.

TATE, TREASURER v. SALMON, &c.

(Filed November 8, 1881.)

1. No action can be brought against the State, until it is authorized by law.

2. Deposit of \$10,000 with the State Treasurer by the Piedmont and Arlington Insurance Co., under section 47 of "An act to establish an Insurance Bureau," approved March 10, 1870, can not be recovered in an action by a policy holder in said company against the State treasurer.

3. Said fund must remain in the custody of the treasurer, subject to such use or appropriation as may hereafter be provided by law.

4. No suit to recover or dispose of said fund can be maintained until the general assembly shall direct by law in what manner, and in what court, it may be brought.

Appeal from Daviess Circuit Court.

Opinion of the court by Chief Justice Lewis.

By section 47 of an act of the general assembly entitled, "An act to establish an Insurance Bureau," approved March 10, 1870, it is provided as follows: "When, by the laws of any other State any taxes, fines, penalties, deposits of money or of securities or other obligations, prohibitions or requirements, are imposed upon insurance companies organized or incorporated under any general or special law of this State and trans-

acting business in such other State, or upon the agents of such insurance company, greater than those imposed upon similar companies by the laws of this State, or when such laws of other States shall require insurance companies of this Commonwealth to deposit money or security for the benefit or protection of citizens of such other States, or when the laws of any other State or the officer thereof, shall prohibit companies of this Commonwealth from transacting business in said State without a special examination of said companies, or a computation of their liabilities by the officers of said State, the same taxes, fines, penalties, deposits, examinations, obligations and requirements shall be imposed upon all insurance companies doing business in this State which are incorporated or organized under the laws of such States and upon their agents."

It appears that the legislature of the State of Virginia passed a law requiring every life insurance company, organized or incorporated under laws of other States, before doing business in that State, to deposit with the treasurer thereof securities of the cash value of at least \$10,000. It, therefore, became the duty of the insurance commissioner of this State, under section 47, just quoted, to require the Piedmont and Arlington Life Insurance Company, a corporation created by law of Virginia, to deposit like securities with the treasurer of this State before, and as a condition of doing business here; and, accordingly, such deposit was made.

This action was brought in the Daviess Circuit Court by appellee, Salmon, against James W. Tate, Treasurer of the State, and others, for the purpose of compelling him to deliver that fund to the commissioner and receiver of that court to be paid and distributed, under orders of court, to the holders of policies of insurance issued by the Piedmont and Arlington Company.

It is alleged in the petition that appellee and others hold such policies of insurance, and have duly paid the premiums thereon; that the company has violated its contract of insurance made with the policy-holders, forfeited its right to receive further premiums, and has become insolvent and made an assignment of its property which is in the hands of the receiver of a Virginia court.

The demurrer to the petition filed by Tate, treasurer, having been overruled, and the court having, by an order, required him to deliver the fund in his custody to the receiver of the court, he has appealed.

The only question necessary to decide is, whether this action can be maintained against the treasurer of the State at all.

By section 6, article 8 of the Constitution, it is provided that "the general assembly may direct, by law, in what manner and in what courts, suits may be brought against the Commonwealth." But the general assembly has not seen proper to enact a general law authorizing such suits to be brought, or conferred upon any court of the State jurisdiction to control and distribute the fund in the custody of the treasurer.

It has been repeatedly decided by this court that, in the absence of a law expressly authorizing it, the State can not be made a party defendant or garnished, and is not sueable in her own courts. "That parties will not be allowed to evade this inhibition by ignoring the State in their suits and proceeding directly against the public officer having the custody of the moneys sought to be reached." (*Divine v. Harvie*, 7 Monroe, 439; *Tracy v. Hornbuckle*, 8 Bush, 336; *Rodman v. Musselman*, 12 Bush, 356.)

As no law has been passed by the general assembly for the disposal of the fund, it must remain in the custody of the Treasurer of the State, subject to such use, or appropriation as may hereafter be provided by law, and no suit to recover or dispose of the fund can be maintained until the general assembly shall direct in what manner, and in what court, it may be brought.

Wherefore the judgment of the court below in overruling the demurrer to the petition, and directing appellant to pay the fund over to the receiver of that court, is reversed and the cause remanded, with directions to dismiss the petition of appellee.

P. W. Hardin for appellant.

Owen & Ellis for appellee.

WILSON, &c. v. EWING, &c.

(Filed November 10, 1881.)

1. "The wife shall be entitled to one-third of the rents and profits of her husband's dowable real estate, from his death until dower is assigned." (Section 8, article 4, chapter 52, General Statutes.)

2. A lien for purchase money is a lien upon the land, but not a lien on rents and profits.

3. The right of the widow to one-third of the rents and profits, from the death of her husband, until the lien is enforced by judgment and sale, or dower is assigned, is not affected by the existence of the lien on the land.

Appeal from Bath Circuit Court.

Opinion of the court by Judge Hargis.

R. W. Mark having died the owner in fee simple of a tract of land on which he owed a part of the purchase money, suit was instituted to enforce the lien therefor and to sell the land to pay his general creditors, his personal estate being insufficient for that purpose.

Pending these proceedings the land was rented for the years 1873 and 1875 by the court's commissioner and receiver, and the widow of Mark occupied and received the rent for the year 1874.

It took 33 acres of the land to pay the vendor's lien, and the court assigned dower to the widow in the remaining 38 acres, 1 rod, and 28 poles, and adjudged that she was entitled to one-third of the rents produced by the last named quantity from her husband's death until she was assigned dower in it, but decreed the distribution between appellees, who are creditors of decedent, of the whole of the rents accruing from the 33 acres after his death and before it was sold to pay the purchase money or her dower was assigned.

From that judgment she has appealed.

The amount of rent collected by her was one-third of the total rents issuing out of said land for the three years named, and she should not have been required to pay any of it to her husband's creditors, as it was the exact amount she was entitled to by law out of said rents.

Section 8 of article 4, chapter 52, General Statutes, provides that:

"The wife shall be entitled to one-third of the rents and profits of her husband's dowable real estate, from his death until dower is assigned."

It is true this court held, in the case of *Harrison v. Griffith, &c.*, 4 Bush, 147, that a widow is not entitled to dower as against a vendors' lien for purchase money, but the question of her right to rent before the enforcement of the lien was not presented or decided in that case, and it is not authority on the question involved here. The lien for the purchase money was upon the land, and not upon the rents and profits, as was held by this court in the case of *Collins, &c. v. Richart, &c.*, 14 Bush, where a lien of this character was considered.

As the rents could not be subjected to the payment of the lien, we can not see how the existence of the lien affects the right of the widow to the rents of her husband's dowable real estate from his death to the assignment of dower to her.

The lien for the purchase money did not destroy, but was superior to, her right of dower.

Had the lien been paid off, no question of her right to dower in the whole tract could have been raised, and the mere existence of the lien, which does not increase, diminish or embrace the rents can not deprive her of the right to one-third thereof, which the statute provides she shall be entitled to for the period these were collected and accrued.

No right of substitution by appellees to the rents exists through the lien holder, as he has no more right to the rents than any general creditor of the husband, and, therefore, the rents should be disposed of as if the lien had never existed.

If the land was dowable real estate, her right to one-third of all the rents named is unquestionable, and section 2 of the same article quoted settles this question in her favor, by declaring that she shall be endowed of the real estate of which he was seized of an estate in fee simple at any time during the coverture.

He was seized of the land during coverture, and the tenure of his estate therein was in fee simple, and the land, was therefore, dowable real estate in the sense those terms are used in section 8 already written out.

Wherefore, the judgment is reversed, and cause remanded for judgment consistent with this opinion.

W. Gudgell & Son for appellants.

N. B. Young, J. S. Hart for appellees.

SMITH v. COMMONWEALTH.

(Filed October 29, 1881—Not to be reported.)

Carrying concealed deadly weapons—County judges and justices of the peace have jurisdiction, under act of March 6, 1876, of prosecutions for carrying concealed deadly weapons.

Appeal from Owen Circuit Court.

Opinion of the court by Chief Justice Lewis.

The only question necessary to decide in this case is, whether a county judge has jurisdiction for the trial of prosecutions for the offense of carrying concealed upon, or about, the person a deadly weapon.

By section 1, article 30, chapter 29, General Statutes, it is provided that a person guilty of that offense, upon indictment and conviction, shall be punished by fine not less than twenty-five nor more than one hundred dollars and imprisoned in the county jail not less than ten nor more than thirty days. And by section 2 it is provided that a magistrate, before whom a person charged with the offense is brought, shall, if after hearing the evidence he believes him guilty, require bail for his appearance at the next term of the circuit court to answer any indictment against him.

By section 9, title 1, Criminal Code, it is provided that all public offenses may be prosecuted by indictment except, 1st, offenses of public officers when a different mode of procedure is prescribed by law. 2. Offenses ordinarily within the jurisdiction of justices of the peace or police courts. 3. Offenses arising in the militia of which a military court has exclusive jurisdiction.

By section 10 it is provided that offenses within the jurisdiction of a justice of the peace, or of a city or police court,

the punishment of which is a fine limited to one hundred dollars, may be prosecuted by a summons or warrant of arrest, in which shall be stated in general terms the offense charged to have been committed.

The purpose of using the word *may* instead of *shall* in the 9th and 10th sections is to provide for the trial of offenses of which justices of the peace and circuit courts have concurrent jurisdiction either by summons or warrant of arrest when tried in justices' courts, or upon indictment in the circuit court.

At the time of the adoption of the General Statutes, circuit courts had exclusive jurisdiction of prosecutions for the offense of carrying concealed deadly weapons, and hence there could be no trial or conviction therefor, without previous indictment, because such is the legal mode of proceeding in the trial of an offense in that court, as well those of which it has concurrent, as those of which it has exclusive jurisdiction.

But by an act of the general assembly, approved March 6, 1878, the criminal jurisdiction of justices courts has been increased, and now they may try persons accused of offenses the punishment of which is, in addition to a fine not exceeding one hundred dollars, imprisonment not exceeding fifty days, or both such fine and imprisonment, which brings the trial of the above named offense within their jurisdiction. And as the mode of procedure is an incident, and not a condition of the exercise of jurisdiction, it follows that such offenses may be now tried either by summons or warrant of arrest in justices courts, or in the circuit court upon indictment.

By subsection 6, section 13, title 2, Criminal Code, judges of county courts have the same original jurisdiction as justices courts.

The court below, therefore, erred in sustaining the demurrer to the defendant's plea of former trial and conviction before the judge of the county court.

Wherefore, the judgment is reversed, and cause remanded, with directions to overrule the demurrer, grant defendant a new trial, and for other proceedings consistent with this opinion.

H. P. Montgomery for appellant.

P. W. Hardin for appellee.

COMMONWEALTH v. BRUCE.

(Filed November 17, 1881.)

1. Judgment of acquittal in felony cases may be reviewed, on the appeal of the Commonwealth, for the purpose of securing a uniform and correct administration of justice, although the judgment can not be reversed.

2. On an indictment for housebreaking the question as to whether the place of ingress is a part of the house charged to have been broken into is a question of law for the court, and not a question of fact to be submitted to the jury.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Hines.

This is an appeal from a verdict and judgment of acquittal on an indictment for housebreaking, the penalty of which is confinement in the penitentiary from one to five years.

The first question is as to the power of this court to review the rulings of the lower court upon judgment of acquittal in felony cases. It was held in *Commonwealth v. Cain*, 14 Bush, and we now hold, that such judgments may be reviewed on the appeal of the Commonwealth for the purpose of securing a uniform and correct administration of justice, although the judgment can not be reversed. This, we think, is the proper construction to be given to sections 885, 887 and 889 of the Criminal Code.

The specification in the indictment is to the effect that appellee broke and entered into a certain storehouse with the felonious intent to steal therefrom. The evidence showed that the accused entered the cellar under the storeroom by removing a grate on the street which gave entrance to the cellar. The evidence further showed that there was a communication through a hatchway to the store, and that the cellar was used to store goods.

The court instructed the jury that, if they believed from the evidence, that the grating removed by the accused was not a part of the storehouse, they should acquit. The only question is as to the correctness of that instruction.

Whether the place of ingress in such cases, which are analogous to burglaries at common law, is a part of the house charged to have been broken into is a question of law for the court, and not a question of fact proper to be submitted to the

finding of a jury, and, therefore, if as a matter of law the grating removed was a part of the storehouse, it was the duty of the court to tell the jury that such entry was a breaking within the meaning of the statute. As a general rule, where there is internal communication between the room or apartment broken into and the room or building into which the accused is charged to have feloniously entered, such entry completes the offense denounced by the statute so far as the act of breaking and entering is concerned. Bishop on Statutory Crimes, section 282. In this case there was such internal communication, and the facts of the case are within the rule stated.

The judgment of the lower court must stand, but the clerk will certify this opinion as containing the law of the case.

P. W. Hardin for appellant.

CASON v. CASON.

(Filed November 17, 1881.)

Defect in not mentioning counterclaim in the caption of the answer may be waived.

The plaintiff having replied to the answer, in the caption of which the counterclaim asserted was not mentioned, he thereby waived all right to raise that objection after issue joined.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge Pryor.

Subsection 4 of section 96, chapter 4 of the Civil Code, provides that, "A defendant shall not have judgment upon a set-off or counterclaim, unless the caption of the answer contain the words, answer and set-off, or the words, answer and counterclaim, but a nondescription in the caption of the nature of the defendant's claim shall not prevent him from having judgment, nor shall a plaintiff have judgment upon a counterclaim unless the caption of his reply contain the words, reply and counterclaim." The object of this provision is to apprise the adverse party that a claim is set up either in the nature of a set-off or counterclaim upon which a judgment is sought, and to prevent him from being misled by denominating the pleading an answer only. In the present case the counterclaim is

styled answer of defendant. This answer seeks a judgment over, and contains all the averments necessary to make it a counterclaim, and the appellant (plaintiff below) replied to the counterclaim and on that pleading an issue was found. The appellant could not have been misled in such a state of case, and he waived all right to object to the pleading after issue joined.

No motion was made in the court below to require the character of the pleading to be given in the caption, but appellant responded to the counterclaim, and on that a judgment was rendered against him.

If there had been no reply to the answer, and a judgment had gone by default for the counterclaim, then that provision of the Code would apply, as the caption had the effect of inducing the plaintiff to believe that no judgment over was sought.

We think the proof authorized the recovery.

The judgment below is affirmed.

C. W. West for appellant.

L. M. Martin for appellee.

TWIN CREEK & COLEMANVILLE TURNPIKE ROAD CO.
v. REMAKER.

SAME v. LANCASTER.

(Filed November 17, 1881.)

"Where several promise to contribute to a common object, shared by all, the promise by each may be a good consideration for the promise of the others."

In this case those who had promised to subscribe stock to a turnpike road company, upon its organization, were not permitted to withdraw from the company after the act of incorporation had taken place.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge Pryor.

These appeals are prosecuted from a judgment of the Harrison Circuit Court, in which a demurrer was sustained to the petitions of the appellant and the actions dismissed.

J. A. Lafferty, John W. Martin, and others, including the two appellees, J. H. Remaker and Reuben Lancaster, were desirous of constructing a turnpike road in the county of Harrison, between certain designated points, and, with a view of

creating an incorporated company under chapter 56 of the General Statutes, so as to begin the enterprise, entered into the following agreement, or made what is alleged to have been a subscription, as follows:

"We, the undersigned, for the purpose of constructing a turnpike road from ————— to ————— (designating the beginning and terminus of the road), promise and agree to subscribe the amount set opposite our respective names to the capital stock of a company to be organized for that purpose, and to pay the same in such installments as may be called for by the proper officers of such company, and we further agree that our said subscription may be subject to a call of ten per cent. as soon as such company or corporation is completed or organized. Given under our hands," &c. Signed by J. A. Lafferty and eleven others, the names of the two appellees being among the number.

The parties, or some of them, to that subscription organized a company with the corporate name of the Twin Creek and Colemansville Turnpike Road Company, for the purpose of constructing the turnpike road mentioned in the subscription.

The appellees were named as corporators, together with the others whose names appear in the subscription, but whether they authorized their signatures to the articles of association filed for record in the office of the county court clerk does not appear.

After the statute had been complied with and the company organized, a call was made on the appellees for a part of their subscription, and, refusing to pay, this action was instituted in the name of the corporation, and on the agreement to subscribe, to recover the amount of the call made.

An answer was filed to the petition, to which there was a demurrer, and that pleading reaching back, the demurrer was sustained to the petition. An amendment was then filed, and a demurrer sustained to the petition as amended, and a judgment rendered for the defendants.

The organization of the company is alleged in the original petition, the promise to pay by reason of the subscription made prior to the act of incorporation, the demand of the

appellees under a call properly made and their refusal to pay, &c. In the amendment it is alleged that the articles of incorporation were entered into in pursuance of the subscription made prior to the incorporation of the company, and that the corporators and others signing the subscription did so relying upon the defendants promise to pay their subscription—that it is in process of construction, with contracts made for that purpose, and the subscription of the appellees is necessary to its completion.

The statements of the petition, as amended, constituted a cause of action. The association, made by virtue of a provision of the General Statutes, is nothing more than a private corporation, and although the improvement contemplated is for the public good, the road, or rather the profits from its use, enures to the benefit of the stockholders, and the contract or subscriptions entered into prior to the organization of the company creates such an obligation as renders the appellees liable for their subscription.

The purpose of signing their subscription was to enable the subscribers to organize and form a corporation that would enure to the benefit of all. It was in fact a mutual agreement by which each subscriber pledged himself to the other to pay a certain sum of money in order to perfect the organization and complete the enterprise. "A subscriber or partner in an intended undertaking, embracing an agreement to take measures to carry out the same, can not discharge himself from liability, or repudiate the concern to which he may have thus pledged himself." (Angel & Ames on Corporations, section 528.)

This was not in fact an agreement to subscribe, but it was a subscription without any other condition than the organization of the company or corporation; "we further agree that our said subscription may be subject to a call of ten per cent. as soon as such a company or corporation is completed or organized."

There was no other condition annexed, and when the articles of incorporation were completed, the company organized, and a call made in pursuance of the agreement and charter, it was the duty of the subscribers to pay the call. The right to collect was contingent only on obtaining the act of incorpora-

tion, and when this was done the agreement to pay was no longer conditional but absolute. (*Thompson v. Page*, 1 Met. Mass., 570). "Where several promise to contribute to a common object, shared by all, the promise by each may be a good consideration for the promise of the others." (*Parsons on Contracts*, volume 1, page 452.)

The agreement in this case is not a mere voluntary donation by the appellees, but an agreement, in effect, to form an association which, when organized and the enterprise completed, will vest the parties with a right of property that will advance their private as well as the public interests, and in such a case, we regard the doctrine as well settled that it is too late, after the act of incorporation takes place, whether the work has or not been undertaken, to withdraw from the association. Cases may be found sustaining the position assumed by counsel for the appellees in this case, denying the right of recovery in the case of a voluntary donation upon the ground that the promise made by one of the donees is the consideration for the promise made by the other. In the case of *Watkins, Treasurer v. Ames*, 9 Cushing, it is said: "Opinion has fluctuated upon the question how far, in a common subscription by several persons, to an object of public utility, the promise of each one is the consideration for that of another. It has been objected that to assume the respective promises as a consideration one for the other is begging the whole question. But if it clearly appear that a number of subscribers promise to contribute money on the faith of the common engagement for the accomplishment of an object of interest to all, and which can not be accomplished save by their common performance, then it would seem that their mutual promises constitute reciprocal obligations."

This court, in the case of *Lackey v. A Turnpike Company*, reported in 17 B. Monroe, held a subscription valid, made payable to the president and directors prior to the act of incorporation, and adjudged that the agreement could be enforced as soon as the obligee came into existence. The contract in this case, it is true, is made with the individual subscribers and not with the corporation, but the article containing the terms of the subscription binds the subscribers to pay the cor-

poration when created, and this was the inducement moving the subscribers to convert themselves into an association for the prosecution of the particular enterprise. The money due is for the corporation, and the promise is to pay the corporation, and the consideration is the mutual agreement between these parties to form the corporation and build the road, and when the corporation was created the appellees were bound by their subscription.

The case of Goff v. Manchester College, 6 Bush, is relied on as authority for the action of the court below. A careful examination of that case will show that the recovery was denied for the reason that the appellees had failed to comply with the conditions annexed to the subscription made by the appellant. It said in the opinion that it is essential to the validity of a contract that it be mutual, and parties to it, and further that appellant did not mutually agree with others to pay the sums named. This does not militate against the principle recognized in this case, and besides the case under consideration is not that of a mere gift of appellees' money to a proven charity, but is an agreement to embark in a common enterprise for the private interests of the parties who are connected with the corporation.

For the reasons indicated the judgment sustaining the demurrer to the petition as amended is reversed, and as the appellees must answer the petition as amended, it is proper to add that the answer as filed permits no defense to the action. The conditions attempted to be annexed to the subscription, if omitted by mistake, or by reason of fraud, could be properly pleaded, but in its present form the answer is defective.

W. T. Lafferty, T. T. Forman, A. Howard for appellant.

W. W. Ratliffe for appellees.

FLOOD, &c. v. PRAGROFF, &c.

(Filed November 22, 1881.)

1. The attestation of a will is of the genuineness of the signature of the testator, and not of the contents of the paper.

It is not necessary under the facts of this case that the subscribing witnesses should have been told that the paper signed was a will; or, that they

should know the character of the paper, or, in fact, that there was any writing other than the signature, on the paper at the time they subscribed it."

2. The date to a will or codicil is immaterial, in all cases. It may be established by oral evidence in contradiction to the written date embodied in the writing.

Where it becomes the duty of the propounders to fix the date of the execution, it may be done in the same way that the time of any other transaction is established—by the writing itself or by extraneous proof.

3. A devisee was a competent witness to prove that after the execution of the codicil he handed it to the testator, although some of the contestants were infants under fourteen years of age.

4. Instructions giving undue prominence to certain portions of the evidence should not have been given in this case, in which,

Two such instructions neutralized each other.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Hines.

Richard J. Usher, in 1873, executed a will dividing his property between the parties to this action, none of whom are related to him, and in 1877 he executed a codicil revoking all devises to appellants, and died within about two years thereafter. The will was admitted to probate without objection, but the probate of the codicil was opposed by appellants on the grounds of incapacity and undue influence, and from a verdict and judgment against them they appeal.

The codicil reads as follows:

"I, Richard J. Usher, of Louisville, Ky., do make this my codicil, confirming my last will, and do hereby revoke all clauses in said will, or previous codicil, bequeathing or leaving anything to Michael Flood or any of his children or connections.

"RICHARD J. USHER.

"GEORGE HOWARD,

"HENRY DEPPEN, JR.

"Louisville, Ky., April 8d, 1877."

The testimony of the subscribing witnesses, Howard and Deppen, is to the effect that they were called upon, in the office of Pragoff, one of the devisees, to witness the signature of Richard J. Usher to the paper offered as a codicil, and that each of them, at the request of Usher, signed the paper in his presence, and in the presence of Pragoff, Usher having signed his name in their presence previous thereto, and that neither

of the deponents saw any writing above the signature of Usher, and that they did not know what preceded the signature, whether it was a will or not, because, they say, that whatever writing, if any, there may have been was concealed by the paper being folded down over it or by reason of its being covered by a blotter. The subscribing witnesses further state that Usher was of sound mind at the time they subscribed the will. The testimony of Pragoff is that he wrote the codicil at the request of Usher, and that the paper presented is the one signed in his presence by Usher and the attesting witnesses, and was, by the witness, after execution, handed to the testator.

Upon the record the following inquiries arise, the consideration of which will sufficiently indicate the objections of counsel for appellants to the ruling of the court below.

First. Is it necessary for a testator to acquaint the witnesses to his will or codicil with the fact that it is a will or codicil?

Second. What is a sufficient signing of a will?

Third. Who are competent to testify on an application to probate a will?

Fourth. Are the instructions given a correct exposition of the law?

In reference to the first and second inquiries it is proper to consider the following provisions of the General Statutes:

"No will shall be valid unless it is in writing, with the name of the testator subscribed thereto by himself, or by some other person in his presence and by his direction; and, moreover, if not wholly written by the testator, the subscription shall be made or the will acknowledged by him in the presence of at least two credible witnesses who shall subscribe the will with their names in the presence of the testator." (Section 5, chapter 113.)

"Where the law requires any writing to be signed by a party thereto, it shall not be deemed to be signed unless the signature be subscribed at the end or close of such writing." (Section 26, chapter 21.)

As to the attestation, the statute appears to have been literally complied with, but it is contended for appellants that a literal compliance is not enough; that there arises, by neces-

nary implication from the language used, a further requisite to a valid execution, and that is, that the subscribing witnesses must know that they are subscribing the will of the person whose signature they attest, or they must be informed by him that it is his will which they subscribe. This, we think, is not required. The legislature has prescribed such formalities as it deemed proper, and we ought not to add to these formalities by construction, especially when the efficacy of the constructive requirement depends solely upon the memory of the subscribing witnesses. After any considerable lapse of time the witness who could remember the circumstances connected with his subscription to the paper so as to be able to state that the person, whose signature he was called to attest, declared that the paper signed was a will, might justly be subjected to the suspicion of fabrication, one of the principal things against which the formalities specifically prescribed were designed to guard. It would be as reasonable to suppose that the legislature intended to require that the subscribing witness should know that the paper was a will by reading it or by having it read to him—something that this court has repeatedly held not essential. (*Higdon's Will*, 6 J. J. M., 445.) These rulings show the understanding of the court to be that the attestation is of the genuineness of the signature of the testator, and not of the contents of the paper. If, then, the witness is not required to know the contents of the paper, which could only be known to him by such inspection, what beneficial end is attained by requiring him to state that the testator declared the writing to be his codicil, or that the signature attested is to his will? But it is insisted that the paper may have been blank and the writing above the signature thereafter made, in which case there would not be a compliance with the requirements of the statute. Such might be the case as well when the declaration is made that the paper contains a will as when there was no such declaration, for it is not to be supposed that the paper was blank, for in that case the signing would be meaningless, unless the person whose signature is attested contemplates a fraud, which could as well be accomplished by a declaration that there was writing on the paper above the signature and that the writing was

was a will. The person making the paper being of sound mind, it is not to be presumed that he is doing a vain or foolish thing in requiring the attestation, or that he contemplates a fraud, so that when the paper is presented for probate and it appears upon its face to be a will or codicil in regular form, without any marks of alteration or other suspicious indications, the presumption is that the writing was on the paper when signed, and that the testator knew its contents.

In such case the burthen is on the contestants to show fraud, incapacity or undue influence. In fact, it is not ordinarily necessary that the propounders should show, as they did, by the attesting witnesses, that the testator was of sound mind, provided the statutory requirements were complied with and there is nothing in the paper when presented which is irrational or inconsistent. Then the burthen shifts to the contestants. (*Milton v. Hunter*, 13 Bush, 163.) It is insisted, however, that the presumption of capacity and volition in the execution of the paper is destroyed by the fact that it appears to have been written by one who derives a benefit from its provisions. Conceding this to be the correct rule, its only effect was to require the propounders to show volition and capacity, which was sufficiently done. (*Bigelow on Fraud*, 127.)

As to whether the subscribing witness must know that the paper signed by him is a will, or whether it must be declared to be by the testator, has never arisen in this State, but in other States, and under similar statutes, it has been held that neither is necessary, and that it is not required that the witnesses should see any writing on the paper.

In the case of *Osborne v. Cook*, 11 Cush., 532, where the testator did not declare the paper to be a will and neither of the attesting witnesses knew or suspected the nature of the instrument, the attestation was held sufficient. (*Ela, &c. v. Edwards*, 16 Gray, 92.) It is true that in these cases the wills admitted to probate were holographic, but this fact was referred to in the opinions for the purpose only of showing that the testator knew that he was making a will, a fact that is satisfactorily shown in this case by other evidence.

In the case of *Brown v. McAllister*, 84 Indiana, 375, the will was written by another than the testatrix, and, while the paper

so folded as to conceal the writing, the witnesses, at the request of the testatrix, subscribed their names without knowing the character of the writing and there was no declaration by the testatrix or any one else as to whether there was any writing on the paper other than the signature of the testatrix, and no statement as to the object in requesting the witnesses to attest the signature. It was held that the statutory requirements had been complied with.

Such also are the rulings of the English courts upon a statute essentially the same as the statute of this State, it having been held in one case at least that the attestation was good where the witness had been deceived and led by the testator to believe that the writing subscribed was a deed, and in another where the writing was concealed. (Bacon's Abridgement, volume 10, page 494 and 502, title Wills and Testaments: 7 Bringham, 457, Wright v. Wright.)

In our opinion it is not necessary, under the facts of this case, that the subscribing witnesses should have been told that the paper signed was a will, or that they should know the character of the paper, or in fact that there was any writing, other than the signatures, on the paper at the time they subscribed it.

As to the second question suggested, it is insisted by appellants' counsel that, as the words and figures, "Louisville, Ky., April 8d, 1877," follow the signatures of the testator and of the witnesses, the paper was not signed at the "end or close thereof," as required by the statute.

This position is untenable. Neither the date nor the name of the place of making the will is, in this case, a part of the will. The date to a will or codicil is immaterial in all cases. It may be established by oral evidence in contradiction to the written date embodied in the writing. While it is conceded by counsel that ordinarily the date is immaterial, it is insisted that the circumstance that the testator had made several wills during his lifetime, constituted this an exception to the rule, as it is important that the codicil appear to have been written subsequent to the will probated in order to effect it. This does not appear to us to be an exception to the rule that the

date is not an essential part of the will, but the fact that several wills were made rendered it proper that it should be established in some way that the codicil was executed subsequent to the will admitted to probate, which was done by one of the witnesses who state that he subscribed the codicil some time in the year 1877, while the will admitted to probate was executed in 1873. The circumstances of each case must determine the importance of the date of execution of a will or codicil, and where it becomes the duty of the propounders to fix the date of execution, it may be done in the same way that the time of any other transaction is established—by the writing itself or by extraneous proof.

On the third point suggested it is insisted that the court erred in permitting Pragoff, one of the devisees, to state that after the execution of the codicil he handed it to the testator, and that as some of the contestants were infants under fourteen years of age and the statement of the witness was "concerning an act done by, and a transaction with, the decedent," it was in violation of the provisions of section 606 of the Civil Code.

Section 605 of the code provides that every person subject to the modifications contained in section 606 shall be competent to testify for himself or another. Subsection 2 of section 606 reads:

"No person shall testify for himself concerning any verbal statement of, or any transaction with, or any act done, or admitted to be done, by an infant under fourteen years of age, or one who is of unsound mind or dead when the testimony is offered to be given, except for the purpose, and to the extent, of affecting one who is living, and who, when over fourteen years of age and of sound mind, heard such statement, or was present when such transaction took place, or when such act was done or omitted."

We think the evidence offered was competent; the object of the statute evidently being to remove the common law ground of incompetency on account of interest, and the exceptions contained in the statute being introduced to secure equality, as said by this court in *Hardin's Adm'r v. Taylor*, 78 Ky., 596. Any other construction would operate in a contest on the probate of a will to exclude the evidence of one interested

as to any statement made by the testator in the absence of one having, or claiming, a conflicting interest, or where the person having, or claiming, such interest is under fourteen years of age. Such a result was clearly not contemplated, and the manifest object being to remove all objection to competency on the ground of interest and to secure equality, any exception insisted upon under the statute ought to be made to clearly appear, and ought not to be established by a doubtful or strained construction. Similar statutes in other States have been so construed, and, as said in Wharton on Evidence, section 464, they are remedial, and their operation will not be limited by a technical closeness of construction. The exception is properly applied when the person offering to testify is seeking to establish, against the decedent, a liability to himself and through the claim thus established to reach the estate. In such cases there is no equality. There is no mutuality, and there ought not, therefore, to be any admissibility; one litigant being silenced by death the other ought to be silenced by law. (Wharton on Evidence, section 466.) But in cases like the one under consideration there is no such inequality. The several claimants of the estate are on an equal footing and there is perfect mutuality and equality so far as opportunity and the right to testify are concerned, and that such opportunity and right are sought by the statute is manifest from other provisions. For instance, by subdivision C of subsection 2, it is provided that the witness may testify for himself when the decedent, his representative, or some one interested in the estate, shall have testified against the witness in reference to any statement by, or transaction with, the decedent; and subsection 8 provides that no one shall testify against one who is before the court by constructive process only.

As to the fourth point, it is objected that the court below erred in giving instruction C, because it is in conflict with instruction No. 8, which was given at the instance of appellants, and which they claim embodies the law.

Instruction C is as follows:

"If the jury believe from the evidence that R. J. Usher signed the paper 'B' (the codicil), this is *prima facie* evidence that he knew its contents before such signing."

Instruction No. 8, referred to, is as follows:

"That from the signing of a last will and testament by a testator, the presumption ordinarily is that he knew its contents, but in the case at bar, if the jury believe from the evidence that the paper marked 'B,' except signatures thereto attested, was written by Wm. Francis Pragoff, and that he and his children were devisees and took benefits under said paper, then this presumption is repelled, and unless they find from additional evidence that said paper 'B' expressed the intentions of said Usher, or that he knew its contents, they should find said paper not to be any part of the will of said Richard J. Usher, deceased."

Without stopping to inquire whether these instructions, or either of them, even abstractly present the law correctly, it is enough to say, that neither should have been given, but as they neutralize each other and do not appear to have been prejudicial to appellants, we will not reverse for this error. These instructions ought not to have been given, because they give undue prominence to certain portions of the evidence when the whole of it should have been left to be considered and weighed by the jury without an intimation from the court as to the weight they should give any particular portion of it. Contested will cases are to be tried as any other case in which there is an issue of fact for the jury. The court must pass upon the admissibility of the evidence offered, but when it goes to the jury they are the sole judges as to the weight they will give it. (Stone's Ex'or v. Shippen, &c., 13 Bush, 188.)

Judgment affirmed.

E. E. McKay, Lane & Harrison and William Lindsay for appellants.

Goodloe, Roberts & Humphrey and Barret & Brown for appellees.

COMMONWEALTH v. SIMONDS.

(Filed November 26, 1881.)

"French Pool," or "Paris Mutual" is a contrivance used in betting, within the meaning of the statute, and the owner or operator, although he incurs no risk, is liable for setting up and exhibiting such "French Pool," under section 6, article 1, chapter 47 of the General Statutes.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Hargis.

The appellee was indicted for the offense of setting up, exhibiting and keeping a contrivance used in betting, commonly known as "French Pool."

It is not disputed that the accused set up, exhibited and used the contrivance known as "French Pool," and that tickets, representing money, were bought from, and registered by him on or by means of the "contrivance."

And the only question in this case for our decision is, does the 6th section of article 1, chapter 47, General Statutes, embrace the contrivance known as "French Pool."

That part of the section applicable to the question reads:

"Whoever shall set up, exhibit or keep, for himself or another, or shall procure to be set up, exhibited or kept, any faro bank, gaming table, machine or contrivance used in betting, or other game of chance whereby money or other thing is, or may be, won or lost, shall be fined," &c.

"French Pool," also called "Paris Mutual," is described to be a small machine containing the name of each horse to be run in a particular race written or printed on the side, and printed numbers placed on the inside of the machine which could be seen through holes in it. It is used by the owner or person operating it, and by those engaged in betting on horse racing, in this way:

The owner or operator sells the tickets for five dollars each; they bear numbers corresponding with the number given the horse on the machine, and by turning a crank or screw attached to the machine the betters are shown at once the number of tickets sold on each horse as each of said tickets is sold, so as to enable him to bet more intelligently and safely, and lessen the chances of disaster to himself. After the race is over the machine is examined to see how many tickets have been sold, and those persons holding tickets on the winning horse get the amount of all the money received by the operator for all the tickets sold by him on all the horses that have run in the particular race, less five per cent. commission on the pool, which the operator of the machine retains for his services.

It is true the operator or owner of the machine, by receiving five per cent. certain, without regard to the issue of the race, is not guilty of gaming or betting in a technical sense, because he hazards nothing, but the ticket buyers are engaged in unlawful betting whereby they either win the money of other buyers or lose their own, and the machine is used by the ticket buyers in betting, and the operator or owner of the machine sets it up, exhibits, and uses it for the ticket buyers and to aid them in unlawful betting, whereby they win money or lose money, and we are, therefore, of the opinion that the evidence shows in this case that the accused set up, exhibited and used the machine known as "Frence Pool," that it is a contrivance used in betting by which betting money or other thing is, or may be, won or lost, and it is within the description of the statute.

This same "contrivance" was introduced into England a few years since and it was declared to be an instrument of wagering and that the wagering by purchase of tickets on a horse race was a wager and game of chance within the statute of 82 Victoria, chapter 52, section 8, which punishes as rogues and vagabonds those who play or bet at or with such a contrivance or instrument in a public place. (*Talbett v. Thomas*, Law R. Q. B., 514-521.)

The case of *Cheek v. Commonwealth*, lately decided by this court, simply held that pool selling was not a bet or game of chance as the seller ran no risk, but that his act might be declared to be a public nuisance under a certain state of concurrent facts.

Wherefore, the judgment is reversed and cause remanded, with directions to grant appellant a new trial and for further proper proceedings.

C. J. Bronston and P. W. Hardin for appellant.

Frank Waters for appellee.

HOWSER v. WATSON.

(Filed November 10, 1881—Not to be reported.)

1. In action by wife of inebriate, under act of March 6, 1878, the petition must allege that the defendant had a license to sell spirituous liquors.

Such a defect in the petition may be cured by answer or verdict. But in

the absence of a bill of exceptions showing that such a defect was cured, the Court of Appeals will not presume that it was cured.

2. Defendant had a right to withdraw his motion for a new trial, and move the court for a judgment non obstante verdicto in this case.

Appeal from Jefferson Common Pleas Court.

Opinion of the court by Chief Justice Lewis.

The statute entitled "An act to amend chapter 29 of article 85 of the General Statutes," approved March 6. 1878, under which this action was brought, neither imposes a penalty nor authorizes a recovery of damages for a violation of its provisions against any other class of persons except those who have licenses to sell spirituous, vinous or malt liquors, and consequently the fact of license is a material element of the law, and it should have been alleged in appellant's petition that appellee had such license when he sold and gave liquor to her husband.

If, however, the issue of license or no license had either been made by the answer or submitted to, and tried by, the jury, this court would disregard the defect of the petition in that respect. But it was not made in the answer. Nor in the absence of a bill of exceptions containing the evidence, and showing what instructions were given, can this court say, or in the face of the judgment of the court below, presume the issue was submitted to, and tried by, the jury.

As the record stands there seems to be no error in the judgment non obstante veredicto, and there is nothing to show that the substantial rights of appellant were prejudiced thereby.

And if appellee was entitled to judgment, it was not error in the court to permit him to withdraw his motion for a new trial.

The amended petition referred to by counsel is not by bill of exception or otherwise before this court, and we cannot, therefore, say the court below erred in refusing to permit it filed, even if it had been offered at the proper time.

Wherefore, the judgment must be affirmed.

Richards & Baskin for appellant.

J. T. O'Neal and Parsons & Beckham for appellee.

COMBS, &c., v. WALLACE.

(Filed November 19, 1881—Not to be reported.)

1. In proceedings on claimants' bond notice may be amended, in discretion of the court.

"The plaintiff in the motion was not required to state in the notice, or show upon the trial that he sustained any loss, by reason of the execution of the claimants' bond, or that he could not have collected his debt otherwise than by a sale of the property claimed, or that his debt was at the time of the trial unsatisfied."

2. A case is not abandoned or discontinued, so long as it is kept upon the docket.

3. Claimant is liable for the value of the property fixed by the appraisal and 10 per cent. thereon. A judgment for a greater amount was erroneous.

Appeal from Powell Circuit Court.

Opinion of the court by Chief Justice Lewis.

This is a proceeding by the plaintiff in execution to recover upon a claimant's bond. The notice was given and motion made at the March term, 1869, of the circuit court, but the case was not tried until the March term, 1879, when verdict and judgment were rendered for the plaintiff for \$225, the property being appraised at the time the bond was given at \$175.

The court having overruled the motion for a new trial the defendant in the motion appeals to this court.

1. The first error complained of is that the court permitted the notice to be amended. The Civil Code expressly authorizes proceedings, as well as pleadings, to be amended in furtherance of justice; and as it does not appear the defendant was either surprised or prejudiced thereby, we cannot say the court below abused a sound discretion in permitting the notice to be amended.

2. The plaintiff in the motion was not required to state in the notice, or show upon the trial that he sustained any loss by reason of the execution of the claimant's bond, or that he could not have collected his debt otherwise than by a sale of the property claimed. If the property was subject to his execution when the levy was made, he was entitled to judgment, unless the debt, interest and cost were shown by the defendant to have been paid off and satisfied previous to the trial.

3. Although the trial did not occur for several years after the motion was made, still as long as the case was kept upon the

docket it could not be considered abandoned or discontinued until an order of court was made to that effect.

4. We perceive no error in the instructions given. Section 716, Myers' Code, requires the court to direct a jury empaneled, and such issues tried as it may prescribe, and also direct which party shall be considered plaintiff in the issue. Two issues were submitted to the jury. The first is, in substance, whether the property was subject to the execution, and the second, what was the value of the property? Though the jury did not, in terms, respond to either issue, but rendered only a general verdict in favor of the plaintiff for \$225, this would not be a reversible error if the judgment of the court had been for the amount at which the property was appraised and ten per cent. thereon. But, as the plaintiff in the notices stated he would move for judgment for the sum fixed by the appraisers and ten per cent. thereon, it was error in the court to render judgment for a greater amount.

For that error the judgment of the court below is reversed and cause remanded, with directions to grant a new trial and for other proceedings consistent with this opinion.

J. B. White for appellants.

ABSTRACTS OF KENTUCKY DECISIONS.

LOUISVILLE, CINCINNATI & LEXINGTON R. R. CO. v. RAMSEY.

Filed October 20, 1881—Not to be reported.

Appeal from Clark Court of Common Pleas.

Opinion of the court by Judge Hargis, affirming.

1. Objection to amended petition made, for the first time, in the Court of Appeals is not considered.

2. Evidence as to speed of railroad train—It is not necessary for a witness to understand engineering or the management of railroad trains, in order to render him competent to testify as to the speed of a train or make him capable of knowing when it is running faster than the usual rate, or safety requires.

3. Jury may judge for themselves as to valuable property injured, for such experience as comes to all men from the ordinary transactions of life, "and also to consider the evidence of value given by farmers and traders and other witnesses, although not acquainted with the actual state of the market."

4. Instruction erroneous on first trial may be rendered proper on second by amended pleading and evidence.

George B. Nelson for appellant.

W. M. Beckner for appellee.

PARKER v. WILCOX, &c.**COLLIER v. SAME.****PARKER v. WILCOX, &c.****HOBBS v. WILCOX, &c.**

Filed October 20, 1881—Not to be reported.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor, affirming.

1. Creditor participating in fraudulent conveyance is postponed in this case—Where a creditor has endeavored to obtain a fraudulent preference over other creditors of an insolvent debtor by joining in the execution of a conveyance of the debtor's estate, such conveyance being void, his claims should be postponed to the claims of other creditors.

2. Waiver of the attachment did not deprive the creditor of his right to resort to other legal steps to subject the land to his debt.

3. Mere inadequacy of price, in the absence of fraud, is not sufficient ground to authorize the chancellor to disturb the purchase of land.

4. A warning order to appear and answer within ninety days, although irregular, was not absolutely void in this case.

C. B. Seymour for appellants.

Harrison & McGrain, B. F. Camp and W. R. Abbott for appellees.

BEATLY v. RALLS.

Filed October 29, 1881—Not to be reported.

Appeal from Bath Court of Common Pleas.

Opinion of the court by Judge Hargis, affirming.

In no case can usury be recovered, except from the party who received it. Nor can such a plea be sustained to a demand in which no usury is embraced, although the proceeds have been used by the borrower to discharge usurious contracts.

Reid & Young for appellant.

Reid & Stone for appellee.

McLAUGHLIN v. McNAMARA.

Filed October 29, 1881—Not to be reported.

Appeal from Harrison Court of Common Pleas.

Opinion of the court by Judge Pryor, reversing.

Correction of account books—The book in which the accounts, between plaintiff and defendant, were kept by the latter, should, in case of non-entry or false entry, have been corrected by means of other evidence.

R. H. Cunningham for appellant.

WALTERS, &c. v. BLEVINS' EX'OR.

Filed October 29, 1881—Not to be reported.

Appeal from Powell Circuit Court.

Opinion of the court by Judge Pryor, affirming.

1. Destruction of property before confirmation of decretal sale, does not release the purchaser from liability.

The property sold by direction of a judgment belongs to the purchaser from the date of his purchase.

Purchaser can not be divested of his title by any of the parties to the action.

2. A commissioner's sale should be sustained, unless it is made manifest that he has violated his instructions.

Fluty, Lilly & White for appellants.

W. H. Holt for appellee.

WASHLE, &co. v. NEHAN.

Filed October 18, 1881—Not to be reported.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Lewis, reversing.

Improvement of alley entirely within the southeast fourth of a square in the city of Louisville. For making such improvement the owners of lots in the fourths of the square not touched by said alley are not liable, under section 2 of the act of February 20, 1873, to amend the charter of said city.

James S. Ray and J. S. Jackson for appellants.

W. P. Lester for appellee.

COSBY v. MATTHEWS, &c.

Filed November 1, 1881—Not to be reported.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Pryor, affirming.

Commissioner's sale, in this case, was valid.

Williams & Powers for appellant.

KIRBY v. BURDETT & HOPPER.

Filed November 1, 1881—Not to be reported.

Appeal from Garrard Circuit Court.

Opinion of the court by Judge Pryor, affirming.

Allowance to sheriff for services in taking care of, or disposing of attached goods should be made by the court before any proceeding can be had to collect any compensation for such services.

Anderson & Herndon for appellant.

CITY OF HENDERSON v. BRECKINRIDGE (TWO CASES).

Filed November 8, 1881—Not to be reported.

Appeal from Henderson Court of Common Pleas.

Opinion of the court by Judge Pryor, reversing.

City Taxes—Collection enjoined—Action to recover taxes after voluntary payment thereof—The city of Henderson levied taxes upon a four-acre lot

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surrounded on all sides but one by principal streets, and on that by a public alley, included in the city limits as extended by act of 1867. The owners after paying such taxes for some years enjoined their collection for other years, and sued to recover back the taxes so paid. Held—

First. That the injunction should have been dissolved.

Second. That if the property, although not properly taxable, was reasonably benefitted by the improvements made by the city around it, the taxes can not be recovered back, although they may have been improperly levied. Nor can recovery be had, if the plaintiffs, knowing their rights in the premises, voluntarily paid the assessment. (*City of Louisville v. Anderson*. MS. opinion.)

James F. Clay and William Lindsey for appellant.

M. Merritt and John Y. Brown for appellee.

BYRD v. KINCAID, &c.

Filed November 3, 1881—Not to be reported.

Appeal from Wolfe Circuit Court.

Opinion of the court by Judge Hargis, affirming.

Consolidation of two suits about separate and unconnected tracts of land, was properly refused in this case.

William L. Hurst for appellant.

H. C. Lilly and E. P. Moore for appellees.

ANDERSON, &c. v. CARRICH, &c.

Filed November 3, 1881—Not to be reported.

Appeal from Scott Court of Common Pleas.

Opinion of the court by Chief Justice Lewis, affirming.

Turnpikes and lateral roads—The legislature intended, by section 13, chapter 110 of the General Statutes, "to prevent the establishment of dirt roads that serve the purpose only of diverting travel from turnpike roads, and enable persons to avoid the payment of tolls, without being necessary for public or individual convenience."

Where dirt roads, even though running laterally with a turnpike, are necessary and the only outlets to the county seat, churches and school houses, they should not be closed by order of county court.

James E. Cantrill and Bradley & Bradley for appellants.

W. S. Darnaby for appellees.

JONES, &c. v. MATTINGLY.

Filed November 3, 1881—Not to be reported.

Appeal from Meade Circuit Court.

Opinion of the court by Judge Pryor, affirming.

Fraudulent assignment of notes and sale of personalty, to avoid paying a debt, are set aside, in this case, for reasons stated in the opinion.

James Montgomery for appellants.

Lewis & Fairleigh for appellee.

TUTT, &c. v. KINCAID, &c.

Filed November 3, 1881—Not to be reported.

Appeal from Wolfe Circuit Court.

Opinion of the court by Judge Hargis, affirming.

1. After granting two new trials the court properly overruled a third motion for a new trial to give the party applying for it an opportunity to prepare pleadings and prepare the cause for trial which ought to have been done years before.

2. When papers, used on the trial in the lower court, are omitted from the record in the Court of Appeals, the presumption must be indulged, in their absence, that such papers would sustain the judgment of the court below, especially when it was appellants' duty to have them before the Court of Appeals on his assignment of error that they are defective and fail to show title in the appellees.

W. L. Hurst for appellants.

H. C. Lilly and E. P. Moore for appellees.

CLAFFY v. HARRIS, &c.

Filed November 5, 1881—Not to be reported.

Appeal from Hardin Circuit Court.

Opinion of the court by Chief Justice Lewis, affirming.

Division of land by conveyance of wife's interest to her husband—One-fourth interest in 178 acres of land was set apart to the wife by the owners of the other three-fourths, by a conveyance of forty-two acres of the most valuable part thereof to her husband in consideration of her interest in the whole and \$375 paid by her husband to the owners of the other three-fourths. After the death of the wife her infant child sued the owners of the 178 acres for one-fourth thereof. The decree of the lower court setting apart to such child one-fourth in value of the whole tract in the forty-two acres conveyed as aforesaid to her father is affirmed.

Wilson & Hobson and R. L. Stith for appellant.

Montgomery & Marriott or appellees.

LILBURN, &c. v. BUSTER'S ADM'R.

Filed November 5, 1881—Not to be reported.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Hargis, affirming.

1. Antedating assignment of note did not defeat attachment in this case.

2. In suing out attachment on return of no property found, no bond is necessary and, therefore, a defective bond did not affect the validity of the attachment in this case.

Pearl & Ewell for appellants.

C. B. Farris for appellee.

DUNCAN'S TRUSTEE v. CLARKE.

Filed November 5, 1881—Not to be reported.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor, affirming.

The will of John L. Martin conferred power upon a majority of his five devisees to keep up and carry on the Mississippi plantation devised to them by him, on joint account of the devisees until January 1, 1880.

The judgment of the lower court in reference to the accounts of M. Louis Clarke, Jr., who had control of said plantation and stocked and put the same in repair prior to its division among the five devisees, is affirmed.

B. H. Duncan for appellant.

Barrett & Brown for appellee.

JOHNSON v. BENNETT, &c.

Filed November 8, 1881—Not to be reported.

Appeal from Ohio Circuit Court.

Opinion of the court by Judge Pryor, affirming.

Widow has the right to elect whether she will accept the provisions of her husband's will, made in her favor, or take what she is entitled to in the distribution of the estate, in her own right.

Walker & Hubbard and J. P. Sandefer for appellant.

McHenry & Hill for appellees.

STEWART v. WILSON.

Filed November 8, 1881—Not to be reported.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge Pryor, affirming.

1. Claimant of piano levied on as the property of claimant's mother, recovered verdict in her favor in this case.

2. A verdict must be palpably or flagrantly against the evidence before it will be disturbed by the Court of Appeals.

A. Perrin for appellant.

C. W. West for appellee.

PITZEE, &c. v. ROGERS.

Filed November 8, 1881—Not to be reported.

Appeal from Christian Circuit Court.

Opinion of the court by Judge Hines, affirming.

A sale of personalty without delivery of possession, was good in this case, wherein the parties to the sale and purchase were members of the same family residing together, and the delivery of possession, as testified to, was consonant to the relations existing between the parties and consistent with good faith and fair dealing.

Breathitt & Payne for appellants.

James M. Wilson and G. A. Champlin for appellee.

VICE v. VICE, &c.

Filed November 8, 1881—Not to be reported.

Appeal from Bath Circuit Court.

Opinion of the court by Judge Hargis, affirming.

Rule as to descent of the real estate of an infant who dies without issue—
"If an infant dies without issue having title to real estate derived by gift, devised or descent, from one of his parents, the whole shall descend to that

parent and his or her kindred as hereinbefore directed, if there is any; and if none then in like manner to the other parent and his or her kindred; but the kindred of one shall not be excluded by the kindred of the other parent, if the latter is more remote than the grandfather, grandmother, uncles and aunts of the intestate and their descendants." (General Statutes, section 9, chapter 31.)

In this case William Vice died leaving a widow and a child by her, named Llewellen, and six other children by a former wife. He was the owner of a tract of land that descended to his heirs. After the division between the widow and the heirs, Llewellen died at the age of four years, and the widow asserted claim to a double portion in Llewellen's share of the real estate which descended to her from her father. Held—That she was not entitled thereto.

Reid & Young for appellant.

R. Gudgeon & Son for appellees.

RILEY v. ALBERTSON.

Filed November 8, 1881—Not to be reported.

Appeal from Greenup Circuit Court.

Opinion of the court by Judge Hargis, reversing.

1. What constitutes mental capacity to contract—"Where a person has mind enough to understand the subject, that is, deliberate upon the matter and weigh the consequences with common reason, he is competent to contract, and no mere want of skill or experience or weakness of mind will destroy mental capacity to contract," but,

2. Unskillfulness or inexperience or weakness of mind in transacting business will be considered where fraud is charged, as in this case.

This case is reversed because of an imperfect settlement of accounts between the parties.

B. F. Bennett for appellant.

George T. Halbert for appellee.

MORGAN v. WOOD.

Filed November 10, 1881—Not to be reported.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Pryor, affirming.

The jury could determine the value of the products, in this case, without proof, after ascertaining the character and quantity of the products from the witnesses.

John H. McHenry and Little & Slack for appellant.

Owen & Ellis for appellee.

DORCH. &c. v. CORUM, RECEIVER, &c.

Filed November 10, 1881—Not to be reported.

Appeal from Greenup Circuit Court.

Opinion of the court by Judge Pryor, affirming.

Conveyances of land and bills of sales of personalty, which were executed and lodged in the clerk's office but not acknowledged by the grantor, not accepted by the grantees, no tax paid for recording, and not ordered to be

recorded, are held to have been fraudulent, in this case, as to creditors whose debts were created after such conveyances and bills of sale were executed and lodged in the clerk's office.

Roe & Roe for appellants.

B. F. Bennett, E. - Dulin and W. C. Ireland for appellees.

GOODPASTER v. RICHART, &co.

Filed November 12, 1881—Not to be reported.

Appeal from Bath Circuit Court.

Opinion of the court by Judge Hargis, reversing.

1. A promise or agreement must be averred to make the petition good, in an action on a promissory note or bill of exchange.

2. The exhibition of the note sued on will not obviate the necessity of setting out the undertaking, promise or agreement.

3. The statement of the consideration does not amount to an allegation that the defendant promised or agreed to pay it.

4. Protection papers of bankrupt must be pleaded—a mere exhibition of them does not authorize a stay of proceedings in a State court.

J. J. Cornelison for appellant.

Reid & Young for appellees.

WADE v. MOORE.

Filed November 2, 1881—Not to be reported.

Appeal from Clark Circuit Court.

Opinion of the court by Chief Justice Lewis, affirming.

1. Bill of exceptions not regarded, if not filed in time prescribed by law—In this case judgment was rendered at the November term, 1879. Time for filing a bill of exceptions was extended to the 3d day of the next succeeding term, May 5, 1880. The bill of exceptions was not filed until May 15, 1880.

Held—That such bill of exceptions can not be regarded. (Bailey v. Viller, 6 Bush, 27; 8 Bush, 475; Civil Code, 334.)

2. Amended petition filed after jury sworn—"There is nothing in the record to show that the court abused the discretion given by section 184, Civil Code, in permitting the amended petition to be filed" after the jury was sworn.

B. J. Peters for appellant.

Rodney Haggard and L. H. Jones for appellee.

WORTHINGTON v. CITY OF COVINGTON.

Filed November 12, 1881—Not to be reported.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Pryor, reversing.

1. Towns and cities—Improvements by—The propriety of making street improvements is a question addressed alone to the municipal legislature.

2. The owners of property must pay for the improvement made in the manner provided by the charter, if the amount is not in plain violation of its provisions.

In this case the city completed the improvement of a street after the contractor had abandoned his contract, and then proceeded to assess the property so as to recompense the city for the expenditure thus made. Held—That "the act of February 3, 1864, amending the city charter, authorizes such improvement to be made, in whole or in part, in any manner the city council may deem proper, and when the contractor failed to comply with his contract we see no reason why the city could not have the work completed."

3. Assessments exceeding half the value of the lots for street improvements is prohibited by the charter of the city of Covington, and such an assessment is directed to be perpetually enjoined.

4. The power to assess in such cases is not judicial.

5. Power to regulate and equalize assessments in the city of Covington has not been conferred upon the courts by the charter of that city, and, therefore, the courts have no power to correct assessments made in that city.

Hallam & Perkins for appellant.

M. L. Roberts and J. R. Harrison for appellee.

HILDRETH v. SHIPP.

Filed November 12, 1881—Not to be reported.

Appeal from Bourbon Circuit Court.

Opinion of the court by Judge Pryor, affirming.

The facts of this case show that the conveyances were intended to defeat the claims of the grantor's creditors, and are, therefore, fraudulent.

Prall & Dickson and Russell Mann for appellant.

D. C. Lockhart for appellee.

GRAY'S EX'OR, &c. v. PATTON'S ADM'R.

Filed November 12, 1881—Not to be reported.

Appeal from Boyd Circuit Court.

Opinion of the court by Judge Hines, reversing.

1. Money received under an erroneous judgment before its reversal may be restored or paid to the party entitled to receive it, by rule of court, or subsequent action, on the return of the case to the lower court.

Defenses against restitution in such cases—Sufficient legal or equitable defenses, if they occurred after the rendition of the erroneous judgment, may be presented, but defenses that were, or might have been, pleaded before the rendition of the erroneous judgment can not be relied on to avoid restitution. (See opinion on first appeal in this case, 13 Bush, 625.)

2. Revivor and demand—If a party dies pending the action and before final judgment a demand of his administrator is not a necessary prerequisite to its revivor against him.

3. The revivor of an action and the revivor of a judgment are procured by different modes of proceedings. In the former the proceeding is by order of court or on motion. In the latter it is by rule or action. (Curry's Adm'r v. Bryant's Adm'r. 7 Bush, 301; 2 Metcalfe, 255; 7 B. Mon., 651; 9 B. Mon., 48; 2 Dana, 61.)

4. Receiver should be required to report to court what amounts he has received, and what dispositions he has made thereof.

E. F. Dulin and Wm. Lindsay for appellants.

K. F. Prichard and A. Duvall for appellees.

ARNOLD v. COMMONWEALTH.

Filed November 13, 1881—Not to be reported.

Appeal from Garrard Circuit Court.

Opinion of the court by Judge Hines, reversing.

1. Misconduct of the jury, made to appear on motion for new trial, is not the subject of review on appeal.

2. Evidence of what a witness has said, introduced for the purpose of contradicting him, when such witness has not been asked if he had made such statements, was improperly admitted.

3. Whether a man was under arrest is a conclusion of law, and not the statement of a material fact in reference to which the witness could be contradicted.

4. An instruction which gives undue prominence to a certain part of the evidence is erroneous.

"The whole of the evidence ought to have been left to be weighed by the jury without direct or indirect interference by the court."

W. O. Bradley and George Denny for appellant.

P. W. Hardin for appellee.

COMMONWEALTH v. RUSSELL.

Filed November 15, 1881—Not to be reported.

Appeal from Boyle Circuit Court.

Opinion of the court by Judge Hines, affirming.

See abstract of Commonwealth v. Simrall, in this number, as the opinion in that case applies to this.

P. W. Hardin for appellant.

COMMONWEALTH v. SEARLS.

Filed November 15, 1881—Not to be reported.

Appeal from Marshall Circuit Court.

Opinion of the court by Judge Hines, reversing.

Cutting and carrying away timber constitute but one offense, under section 7, article 28, chapter 29, of the General Statutes.

P. W. Hardin for appellant.

Gilbert & Reid for appellee.

GREER v. COMMONWEALTH.

Filed November 15, 1881—Not to be reported.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Hines, affirming.

Occupancy of faro room—How proved—It was competent in this case to show that persons in order to reach the room in which faro was dealt, passed through the rooms under the control of the defendant, and in which he was at the time doing business, to establish the fact that the faro room was also under his control.

W. N. Sweeney & Son for appellant.

P. W. Hardin for appellee.

COMMONWEALTH v. SIMRAIL.

Filed November 15, 1881—Not to be reported.

Appeal from Boyle Circuit Court.

Opinion of the court by Judge Hines, affirming.

1. Renting a house for the use and purpose of creating a nuisance is an offense at common law.

2. "To sell whisky, in any quantity, without license, unless the person so selling is a merchant or unless the liquor is sold to be drunk upon the premises or adjacent thereto," is no offense either at common law or under the statute. The indictment is defective unless it charges these facts.

P. W. Hardin for appellant.

Durham & Jacobs for appellee.

BELL v. COMMONWEALTH.

Filed November 15, 1881—Not to be reported.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Hines, affirming.

A continuance on the grounds that the defendant was about to be tried at the term during which the indictment was returned, when there has been no examining trial and the accused was not in custody on the charge embraced in the indictment was properly refused in this case.

The defendant did not allege that he had any defense to present or that he would, in any respect, be in a better attitude to make defense at the next term of the court, and having been tried by an impartial jury, represented by counsel, and confronted by the witnesses upon whose testimony he was convicted, his substantial rights have not been prejudiced, and the case can not be reversed.

W. N. Sweeney & Son for appellant.

P. W. Hardin for appellee.

DUTLINGER, &c. v. SALMONS, &c.

Filed November 15, 1881—Not to be reported.

Appeal from Simpson Circuit Court.

Opinion of the court by Judge Pryor, affirming.

1. Parol contracts between husband and wife as to the personalty of the wife, in the husband's possession and under his control, will not be permitted to interfere with the claims of the husband's creditors.

2. "The husband may have practiced a fraud on his wife, and the facts of the record conduce to show this and nothing more, but it is too late, after he has used the (his wife's) money for his own purposes, for the wife to assert her claim as against his creditors."

C. W. Milliken for appellants.

Walker & Walker for appellees.

CITY OF PARIS v. FALLON.

Filed November 19, 1881—Not to be reported.

Appeal from Bourbon Circuit Court.

Opinion of the court by Chief Justice Lewis, affirming.

1. Unless the verdict is flagrantly against the evidence the Court of Appeals will not reverse on the ground that the verdict is contrary to the weight of the evidence.

2. The testimony of witnesses, improperly admitted and objected to, whose testimony is not prejudicial to the substantial rights of the appellant, is not cause for reversal.

8. Instructions are sufficient when substantially correct.

Charles Offutt for appellant.

MOORE v. RIGGLE, &c.

Filed November 19, 1881—Not to be reported.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Pryor, affirming.

The assignee of a sale bond is substituted to the rights of the assignor, with power to enforce its collection in the same manner the payee could have done.

R. D. Handy for appellant.

D. A. Glenn for appellee.

AUGUSTUS, &c. v. McPHERSON.

Filed November 19, 1881—Not to be reported.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor, affirming.

1. Certificates of acknowledgment by deputy clerk—"The question as to the endorsement made by the deputy clerk can not arise, in this case, for the reason that a certificate of acknowledgment has been made by another deputy in the name of his principal in the manner and form required by law."

The Court of Appeals refuses to investigate the question as to which of the deputies took the acknowledgment.

2. The testimony of the wife of the mortgagor, to show mistake in the certificate of the acknowledgment of the mortgage, is "entitled to but little weight as against the mortgage."

"The husband may have defrauded, and perhaps did defraud, his wife, and she may not have fully comprehended the instrument, but the mortgage certificate establishes the fact that she did, and her testimony will not overthrow it."

Harlan & Wilson and R. T. Colson for appellants.

Ernest McPherson for appellee.

BALL v. PURSEFULL, &c.

Filed November 23, 1881—Not to be reported.

Appeal from Lincoln Circuit Court.

Opinion of the court by Judge Hargis, reversing.

1. Natural objects mentioned in a deed will control courses and distances.

Description of a tract of land, as a certain "mill seat, together with the dam and all its appurtenances," includes, in this case, the south end of the mill dam resting on the opposite side of Dix river.

The court erred, in this case, in cutting the mill in two, and leaving only a fragment of it within the lines of the deed.

2. "The grant of a mill carries with it the use of the water by which it is worked, the flood-gates, dam, and all things necessary for its use, as well as the soil and freehold of the land on which it stands, and that over which it projects, and such a grant may embrace land adjoining the mill which is necessary for its use, and which is actually used with it, at the time of the grant."

3. A deficit of three acres of land, not worth more than \$25, in a mill seat of twenty acres, is too small to authorize a rescission; and,

The purchaser of the adverse claim to the three acres by the vendee should inure to the benefit of the vendor.

Hill & Alcorn for appellant.

Welch & Saufley for appellees.

MAYFIELD v. BARBOUR.

Filed November 22, 1881—Not to be reported.

Appeal from Lewis Circuit Court.

Opinion of the court by Judge Pryor, reversing.

1. "The creditors of a partnership have no lien on the firm assets, except through the partner, and the denial of the right of one partner to appropriate partnership assets to his individual use, is for the protection of the copartners, and not for firm creditors; and, therefore,

2. "Where each individual member of the firm consents to the appropriation of firm assets to use of one partner, it is as binding as if applied to a partnership debt."

G. T. Halbert for appellant.

J. R. Garland for appellee.

MASON'S ADM'X v. MASON.

Filed November 22, 1881—Not to be reported.

Appeal from Logan Circuit Court.

Opinion of the court by Chief Justice Lewis, affirming.

1. Limitation as to cause of action against personal representatives, which accrued during the life of the decedent—"No action, upon a cause which accrued against a deceased person in his lifetime, shall, when his estate has been distributed and divided, be brought against his heir or devisee jointly with his personal representative, after the expiration of seven years from his death." (Section 7, article 4, chapter 71, General Statutes.)

2. A devisee, appointed executor, who has refused to qualify, and, without administration, has taken the estate into his own hands, can not plead limitation to an action, which accrued in the lifetime of his decedent, brought against him after the expiration of seven years from the date of his qualification, unless he has, before the action is brought, settled his accounts and made distribution of the whole estate in his hands.

J. H. Bowden, R. S. Bevier and W. F. Browder for appellants.

A. G. Rhea for appellee.

BEAL v. BETHEL, &c.

Filed November 22, 1881—Not to be reported.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Pryor, reversing.

Assignee of note executed for a vicious consideration—moonshine whisky—being an innocent holder thereof, the obligor executed a new note to him as a compromise of his claim thereon. Held—That the latter note is valid and its payment enforceable by suit.

W. H. Chelf for appellant.

TODD v. TODD, &c.

Filed November 26, 1881—Not to be reported.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Hargis, affirming.

The proof not being satisfactory, in this case—two papers having been executed—the one last executed is held to control the inconsistent expressions contained in that first executed.

W. B. Smith for appellant.

C. F. & A. R. Burnam for appellees.

SATTERFIELD v. GREEN, &c.

Filed November 26, 1881—not to be reported.

Appeal from Bath Circuit Court.

Opinion of the court by Judge Hargis, affirming.

The evidence can not authorize a recovery of a sum greater than that alleged by the pleadings to have been due.

“Evidence, without allegation, is as unavailing as allegation unsupported by evidence.”

D. E. Conner for appellant.

Reid & Young for appellees.

The following proposition for the relief of the Court of Appeals and to secure a decision of all legal controversies by the highest court, or the court of last resort, has been prepared and handed to us by able lawyers who have given the subject careful attention. We commend it, and the other plan which proposes a judicial commission, to the consideration of the bar, and of the general assembly:

AN ACT TO ESTABLISH AND REGULATE A SUPERIOR COURT.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

§ 1. That there shall be established a Court of Justice for the Commonwealth of Kentucky, known as the “Superior Court,” to be held by four judges, who shall have the same

qualifications as are now required by law for judges of the Court of Appeals. Any three of them may constitute a court for the transaction of business. On the first Monday in August, 1882, and every eight years thereafter, there shall be elected, by the qualified voters of this Commonwealth, four persons, qualified as aforesaid, as judges of said court, no two of whom shall be residents of the same appellate district. If there is more than one candidate from any appellate district, the one receiving more votes in the whole Commonwealth than any other candidate from that district, shall be declared elected from that district. When so elected, they shall hold their offices for a term of eight years. Each one of them shall serve as the presiding judge of said court for two years of his term, and they shall decide among themselves, by lot, the order in which they shall so serve.

§ 2. The Superior Court shall have the exclusive appellate jurisdiction over the final orders and judgments of all other courts of this Commonwealth that the Court of Appeals now has, unless otherwise provided in this act, and all the laws now in force, in regard to appeals to the Court of Appeals, and the trial thereof, shall be applicable to appeals to the Superior Court, unless otherwise provided in this act.

§ 3. The Superior Court shall have no appellate jurisdiction over the final orders and judgments of any court, where the same involves (1) a construction of the Constitution of Kentucky or of the United States; (2) the title to real estate; (3) cases of felony; (4) the probate of a will, (5) judgments for money or personal property, if the value in controversy be greater than \$3,000, exclusive of interest and cost.

§ 4. The Court of Appeals shall have appellate jurisdiction over the final orders and judgments of the Superior Court in all cases except the following:

1. Those for fines or for the recovery of money or personal property, where the amount of the fine, or the value in controversy, be less than \$1,000, exclusive of interest and costs.

2. Those cases where the judgments of the lower court have been affirmed by the unanimous vote of the judges of the Superior Court sitting when the decisions were rendered.

But if in any case coming within either of the above exceptions, any two of the judges of the Superior Court shall certify that they know of no statute of Kentucky, or of the United States, supporting the decision of a question of law passed upon by the Superior Court in that case, and no precedent therefor among the decisions of the Court of Appeals, and that, in their opinion, the question is one of sufficient importance, the party against whom the decision was rendered shall be entitled to take the same by appeal to the Court of Appeals, as in other cases.

§ 5. All appeals from the Superior Court to the Court of Appeals shall be prayed and granted in the Superior Court. But no appeal shall be granted except within six months next after the right to appeal first accrued, unless the party applying therefor was a defendant in the original action, and an infant not under coverture, or of unsound mind, or a prisoner who did not appear by his attorney—in which cases an appeal may be granted to such parties or their representatives, within six months next after their deaths, or the removal of their disabilities, whichever may first happen.

§ 6. The Clerk of the Court of Appeals shall be, ex officio, the clerk of the Superior Court. In all cases pending in the Superior Court, he shall discharge the same duties as are now required of him by law in cases in the Court of Appeals, and shall be allowed the same fees therefor.

Whenever an appeal is granted from the Superior Court to the Court of Appeals, the clerk shall transfer the case from the docket of the Superior Court to that of the Court of Appeals, and it shall not be necessary for the party taking the appeal to have a new transcript of the record made, but shall be entitled to use, in the Court of Appeals, the same record upon which the case was tried in the Superior Court. All laws that are now in force, regulating appeals from other courts to the Court of Appeals, that are not inconsistent with this act, shall, in so far as the same are applicable, regulate appeals from the Superior Court.

§ 7. The provisions of chapters one, two and three of title XVIII of "An act regulating practice in civil cases," and all

amendments thereto, except section 766, and articles two and three of chapter first of title IX of "An act to regulate practice in criminal cases," and all amendments thereto, except section 846, shall be applicable to the Superior Court.

§ 8. The Superior Court shall hold its terms at Frankfort, Ky., and it shall be the duty of the same officers who now provide rooms for the Court of Appeals to hold its terms in, to provide suitable rooms for the Superior Court, and the expenses thereof shall be paid in the same manner as those of the Court of Appeals are now paid.

§ 9. All writs, summonses and processes of the Superior Court shall be executed in the same manner, and by the same officers, as those of the Court of Appeals, in similar cases, and the same fees shall be allowed therefor. And chapter 99 of the General Statutes of Kentucky, shall be applicable to the Superior Court.

§ 10. Power is vested in the Superior Court to administer oaths, punish contempts, and make rules, consistent with law, for the government of its proceedings; and to any judge thereof power is given to reinstate attachments and injunctions in any case where the appeal, if taken, would lie to the Superior Court.

§ 11. Sections 1, 2, 3, 4, 5, 9, 11 and 12, of article II, chapter 28, of the General Statutes of Kentucky, shall be applicable to the Superior Court.

§ 12. The Superior Court shall, by its own orders, declare what shall be regarded as a term, or the commencement or end of a term, in order to conform to any law or rule of court requiring anything to be done before the commencement, or after the end of a term, or within a certain number of terms; and said orders shall be so framed that there shall be four terms in each year.

§ 13. The laws now applicable to filling vacancies in the Court of Appeals shall be applicable to filling vacancies in the Superior Court, except that when an election is required, it shall be by the qualified voters of the whole Commonwealth. But no one shall be eligible to fill such vacancy unless he has been a resident, for two years next preceding the vacancy, of

the same appellate district from which the judge was chosen, whose death, removal or resignation caused the vacancy.

§ 14. The judges of the Superior Court shall be paid the same salaries, and in the same manner, as the judges of the Court of Appeals are now paid.

§ 15. It shall be the duty of the Attorney General to represent the Commonwealth of Kentucky in all cases pending in the Superior Court, to which it is a party, and he shall be allowed the same fees therefor, and be paid in the same manner as by law he is now paid in similar cases in the Court of Appeals.

§ 16. When a case has been decided by the Court of Appeals that has been taken there by appeal from the Superior Court, it shall not be necessary for any mandate to issue to the Superior Court, but the mandate shall go directly to the court from which the case was appealed to the Superior Court; and the laws applicable to other mandates, from the Court of Appeals, shall be applicable to mandates in such cases, and to mandates from the Superior Court.

§ 17. This act shall not affect appeals granted prior to the first Monday in August, 1882, but the Court of Appeals shall transfer to the Superior Court all cases pending in the Court of Appeals on said date that have not been heard, in which the appeal would lie, under the provisions of this act, to the Superior Court, if taken subsequent to said date.

§ 18. Elections under this act shall be conducted by the same officers, and in the same manner, as other elections for officers for the State at large.

§ 19. All laws and parts of laws inconsistent with this act, or any part thereof, are hereby repealed.

To the Editor of the Kentucky Law Reporter :

The judiciary is the most important department in all governments, and the importance of the court of last resort can scarcely be overestimated.

The people of Kentucky must have relief at whatever cost. It is of importance that causes be decided, but of far greater moment that they shall be decided right.

It is absolutely impossible for the Court of Appeals to decide the vast number of causes that crowd the docket. In an effort to dispose of as many

as possible the court has been driven to a division of the cases among the four judges; the result is, that, in a large majority of cases, the opinion is virtually the judgment of one man. The consequence is, that there is a growing want of confidence on the part of litigants, and the opinions of the court do not command that respect, at home or abroad, that we would wish to see accorded to our highest court.

In a conversation with one of the judges of the Supreme Court of Ohio, he made the following statement as to the manner of trying cases in that court. He said in substance: "We read the record together, taking the reading by turns, discuss the facts and law of the case, make notes, and, when fully satisfied, make a memorandum stating the conclusions of the court upon the facts, and also the law. These memorandums with the record is handed to one of the judges, and he takes it to his room where it is filed away to remain for several days, until the first impressions have passed from his mind; he then reads the record alone and if, upon a careful examination, any fact appears, deemed important, or any question of law that escaped the court at the first reading, it is his duty, to bring the record back to the consultation room, and the new questions are considered and settled; then the judge to whom the record is first given writes the opinion which is submitted to the full court, criticised, and corrected if necessary, and then delivered as the opinion of the court."

Will any one say that this involves unnecessary labor and care? True, it is impossible for our court to dispose of half the business and give the causes such an investigation, but this is not the question.

From the decisions of the appellate court there is no appeal, except in a few cases involving questions under the Constitution of the United States, or treaty or law of congress. The dearest rights of citizens, of person and property, are settled by the judgments of the appellate court, and it will not be controverted that nothing short of the most thorough and critical examination of every case should be given. If, as the court is at present constituted, with the amount of business, this can not be done, the legislature should furnish a speedy remedy. I say distinctly that I intend no reflection upon the court; the judges work hard, have adopted the best system possible with a view to disposing of all the business, and the wonder is that so few mistakes are made.

It is a shame, a disgrace, to the State that so much is required of four men, and they unprovided with comfortable quarters for business. There should be a committee parlor with library, and separate adjoining rooms for the judges.

If the next legislature shall adjourn without making some provision for the relief of the court and people, it will fall in the most important matter that should engage the attention of that body. Make it possible for the court to give causes a thorough investigation, and the petitions for a rehearing will be few, and the opinions of our court will command the respect to which the opinions of the court of last resort are, or should be, entitled.

W.

SUPERIOR COURT OR JUDICIAL COMMISSION?

"An act to establish and regulate a Superior Court," which we print on pages 398-403, was reported in the senate by Senator Hayes, from the Committee on the Judiciary, December 3, and recommitted.

Section 1 of said bill should be amended by striking out all that part providing that no two of the judges shall be residents of the same judicial dis

trict, etc. Whilst many good reasons might be given why the people of the whole State have and should exercise the right to elect the most competent persons to fill all State offices without any restriction as to the residence of the candidates, not a single good reason can be given to the contrary.

The creation of appellate districts by our present Constitution was a grave mistake.

Judges of the Court of Appeals and judges of the Superior Court, if the proposed bill should be passed, will be essentially State officers. The best interests of the people of the whole State require that the most competent shall be selected to fill all State offices without any reference whatever to the residence of the candidates.

Any limitation upon the right of the people, by requiring them to elect candidates residing in certain districts, just that far abridges and deprives them of the right to select the most competent, and compels them to elect a candidate residing in district A, not because of his qualifications or fitness for the position, but because he "eats his hash" or "has his washing done" in district A.

We might suggest sundry other amendments, but instead of doing so, will suggest what should be the leading ideas in a bill creating another appellate court.

First. The court should be composed of three or five judges.

Second. The judges should be appointed by the governor, subject to the confirmation of the senate, or elected by the people of the whole State, on account of their qualifications and fitness to discharge the high duties imposed upon them, and not because they "eat their hash" or "have their washing done" in a particular district.

Third. The jurisdiction of the court should be regulated so as to avoid, as far as possible, any conflict between the final decision of that court and the Court of Appeals. Any conflict between the final decisions of the two courts on personal or property rights would be fraught with much if not incalculable mischief.

Fourth. The Superior Court should have final jurisdiction of appeals in all criminal and penal cases, and of some class or classes of civil cases, so as to divide the business of the two courts, as near as may be, equally, and at the same time enable each to decide the cases on its docket within a reasonable time.

If a bill can not be framed so as to embody the leading ideas above suggested, a judicial commission might be provided for to assist the Court of Appeals to dispose of the large number of cases now remaining undecided in that court.

Judicial commissions have been resorted to advantageously in many other States, to aid their courts of last resort.

Whether a superior court or judicial commission shall be established is perhaps the most important question which will claim the consideration of the present general assembly. Unless it establishes one or the other it will fail to discharge a high constitutional duty. The Constitution (section 15, article 13) provides: "That all courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered, without sale, denial, or delay."

To provide by law, that "right and justice" shall be "administered, without sale, denial or delay," by providing for more speedy decisions in the

court of last resort is an imperative duty imposed upon the members of the present legislature by the Constitution, and also by the oath taken by each member thereof.

This imperative duty can only be discharged by the present legislature in one of three modes, first, by establishing another appellate court; second, by creating a judicial commission to aid the judges of the Court of Appeals, or, third, by increasing the minimum of jurisdiction of the Court of Appeals so as to reduce the business of that court to such an extent as to make it possible for four judges to dispose of, and keep up with, the business of that court.

As to the three modes above suggested, we would prefer the proposition to increase the minimum of jurisdiction.

By increasing the minimum of jurisdiction and establishing a superior court, or judicial commission, with final jurisdiction in some class or classes of cases to aid the Court of Appeals to dispose of the large number of cases already submitted, and get up with its docket, the legislature will, in our opinion, best subserve the public interests.

If the minimum of jurisdiction is increased, the establishment of the superior court or judicial commission will be a temporary expedient to enable the Court of Appeals to get up with its docket, and, therefore, the superior court or judicial commission, composed of three judges, should be established for a term of two years only, and the next legislature should be left perfectly free to determine both, as to the success of the experiment, and the necessity for its continuance.

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HOKE v. COMMONWEALTH, &c.

(Filed December 8, 1881.)

1. Auditor's agent act—"An act authorizing the auditor to appoint agents to attend to revenue matters," approved April 29, 1880, is constitutional—

1st. The subject of said act is expressed in its title.

2d. The auditor's agent is not an officer in the constitutional sense, and, therefore, said act is not unconstitutional, because it does not fix or limit the term of such agent.

He is the agent of the auditor—

The term being prescribed for the auditor fixes a certain and defined term for the agent, subject to the power of removal authorized by said act.

3d. The auditor's agent is not required to perform the duties of the assessor—he is required to do that which the assessor has omitted to do—

2. The auditor's agent is authorized to give information and take steps in the county court to enable the county court to rectify the errors and supply the omissions of duty on the part of the assessor.

3. The penalty prescribed by said act for failing to list property for taxation is not enforceable as to past failures, but notwithstanding this said act may be enforced in all other respects.

4. The county court should hear and determine the questions made on the relation of the auditor's agent against a taxpayer for failing to give in his property to the assessor, etc.

The judgment of the lower court awarding a writ of mandamus against the judges of the Jefferson County Court to hear and determine the complaint of the auditor's agent against a taxpayer for failing to properly list his taxable estate with the assessor, etc., is affirmed.

Appeal from Jefferson Common Pleas Court.

Opinion of the court by Judge Pryor.

The relator, M. S. Barker, filed his petition in the Jefferson Court of Common Pleas in the name of the Commonwealth,

asking a mandamus against W. B. Hoke, as judge of the Jefferson County Court, compelling the latter to act on the information given him with reference to the failure of one Keegan to list his property for taxation. M. S. Barker, at whose instance this proceeding is had, was appointed by the auditor auditor's agent under an act of the general assembly approved April 29, 1880. By virtue of the provisions of that act the duty is imposed on the agent of filing information against those who have not given in a proper list of their taxable property, so as to enable the county court to require the payment of taxes upon it. It is alleged in the petition that such an information had been filed in the county court of Jefferson county against Keegan, and the judge of that court had refused to hear the complaint of the Commonwealth on the ground that the act was unconstitutional. It is also alleged that it was the duty of the court under the act to assess the property for taxation, if upon the hearing it should be made to appear that the owner had failed to list it or pay the State the taxes.

There was a demurrer filed to the petition, and also an answer, in which it is alleged that the county court refused to hear the case because he deemed the information insufficient. This answer, unexplained, might present an obstacle to the proceeding by mandamus to compel action on the part of the county judge, but the opinion delivered by him in that case, or the reason for not proceeding to hear the case, is that the act being unconstitutional, the court had no power to proceed under it, and such we understand to be the position of counsel in the oral argument of this case. So the question will be treated as if the court had refused to proceed when the Commonwealth made out the case upon the ground that the act was unconstitutional, and the court had no power over it. The judge of the circuit court, in awarding the mandamus, did not undertake to direct the county court as to the manner in which the discretion of that court should be exercised, but left all such questions to be considered when the facts of the complaint were made known. All that is required of the county judge by the mandate from the Superior Court is that he shall take cognizance of the case for the purpose of determining whether the information is true or false. The listing of the

property by the county judge, and ascertaining its value, are essentially ministerial acts, and all that the judge of the circuit court has said is that it is the duty of the county court to hear the complaint when properly made. The constitutionality of an enactment conferring on the county court the power to assess the property of delinquents was expressly decided by this court in the case of *Pennington v. Woolfolk*, 79 Ky., —. It was then held that ministerial and judicial powers were blended in that tribunal, and to hold otherwise would divest it of a jurisdiction always recognized and render invalid many of the statutes giving it a supervisory power in a ministerial character over county officials.

This power of the county court over delinquent taxpayers has existed by reason of legislation since the foundation of the State government, and such jurisdiction, when properly conferred, has always been recognized not only as constitutional, but as vested in a tribunal peculiarly adapted to the proper determination of all such questions. The awarding of the mandamus was, therefore, proper unless other constitutional inhibitions have been disregarded in the enactment of this law. It is insisted the act is unconstitutional, first, because the subject of the act is not expressed in the title; second, the agent, Barker, is not an officer, for the reason there is no term fixed for the office; third, because it confers on the department of auditor the duties, powers and emoluments of the county assessor.

Article 2 of section 37 of the State Constitution provides that "no law enacted by the general assembly shall relate to more than one subject, and that shall be expressed in the title." The act under consideration is entitled "An act authorizing the auditor to appoint agents to attend to revenue matters." It is urged in argument that, in reading the title of this act, the mind would be led to the conclusion that it was merely an act to relieve the auditor from the burden of the revenue department by allowing him to appoint agents or assistants in such counties as he might see proper. We concur with counsel that such would be the conclusion, but it would suggest in addition an inquiry as to the power conferred on the

agent, and the business he was authorized to transact with the department in order to relieve the auditor. The latter, by article 10, chapter 72, General Statutes, had been clothed with the authority of receiving from banks and other like corporations the amount of taxes due for each year, and of receiving reports from railroads and turnpike road companies, so that their taxes might be paid directly into the treasury; and in the attempt to collect from the delinquent taxpayer it was manifest that the auditor could not leave his office for the purpose of visiting each county so as to file an information against those who had avoided the payment of tax; and to relieve him of this duty he was empowered to employ agents to discharge such duties, and those agents, when appointed, were at once connected with his department and subject to his control. The auditor is the head of the department, with clerks and agents under him, all of whom are guided by him in the discharge of their respective duties; and the very purpose of the act was to require this agent, the appointee of the auditor, to perform certain minor ministerial duties outside the doors of the office that the auditor was not expected or required to perform. The title, "auditor's agent," was itself suggestive to any mind acquainted with the past legislation of the State as to the duties imposed by the act, and while such a title may not be sufficiently comprehensive to direct an inquiry as to the power conferred, it was certainly suggestive, and when you add to it the words "to attend to revenue matters," it would certainly induce the legislator to examine its provisions with a view of ascertaining what matters pertaining to the revenue this agent, when appointed, was required to look after.

It is insisted, however, the agent is required to perform duties that the auditor, his principal, can not exercise, and, acting independently of the auditor, the title of the act does not indicate the exercise of a power by the agent that is withheld from the principal. It was certainly not expected that the auditor could discharge in person all the duties pertaining to his office, and necessary to the collection of the tax from the taxpayer, and, therefore, the agent had assigned to him certain specified duties that are not required to be performed by his principal. See

The act conferring these powers on the agent does not create an independent office, or make the action of the auditor subordinate to that of the agent. On the contrary, the agent holds his office at the mere will of the auditor, and is subordinate to the will of the latter in all his actions with reference to the revenue.

The very language of the act, as well as the title, was designed to make the agent subordinate to his principal. He appoints him in the first place, takes from him a bond, and the result of all his actions, whether in the county court or elsewhere, is required to be certified to the auditor. He can remove him at his will, and the mere fact that the auditor is not present in person to give the information to the county court, or to receive the money from the taxpayer, if paid without the information, does not create an independent office. The entire supervision of the revenue department, so far as these agents are concerned, is under his control, and conceding the fact that he is not authorized to discharge some of the duties imposed on these agents, and still the title of the act is not misleading.

This court, in the case of *Phillips v. The Cincinnati and Covington Bridge Co.*, 2 Met., —, in discussing the object and effect of the constitutional provision in question, said: "It should not be so construed as to restrict legislation to such an extent as to render different acts necessary when the whole subject-matter is connected, and may be properly combined, in the same act." And again: "None of the provisions of a statute should be regarded as unconstitutional when they all relate, directly or indirectly, to the same subject, have a natural connection, and are not foreign to the subject expressed in the title."

In the case of the *Louisville and Oldham Turnpike Road Co. v. Ballard*, 2 Met., —, it is said: "A more liberal construction of this clause of the Constitution will be not only more consistent with the objects intended to be accomplished by it, but will be found necessary in the practical business of legislation." This character of construction has been followed in the cases of *Johnson v. Haggard*, 8 Met., —; *Smith v. Cochran*, 8 Bush, —; *O'Nann v Louisville and Lexington Railroad Co.*, 8 Bush, —;

Jacob's Administrator v. Louisville and Nashville Railroad Co., 10 Bush, —, and numerous other cases, and when applied to the title of the act before us we find each provision has a connection with the subject expressed in the title.

The subject is in fact revenue matters. The auditor is the chief officer of the revenue, and he is by this act authorized to appoint agents to attend to the revenue. The information, the summons, the action of the county court, all have a direct connection with the subject-matter expressed in the title. They all have a natural connection, and no provision to which our attention has been called can be said to be foreign to the title. The title to an act obviously delusive, or where the body of the bill is foreign to the title, is unconstitutional, as where the title is to amend an act relating exclusively to attorneys, and the subject of the act is revenue and taxation. Such a title is deceptive and misleading, and was held by this court, in the case of Pennington v. Woolfolk, to be unconstitutional. We are satisfied the subject of legislation found in the enactment is sufficiently expressed in the title.

As to the second constitutional objection made by counsel, we are of the opinion that the agent is not an officer within the meaning of the Constitution, and there was no necessity for limiting his term of office. He occupies the same relation to the auditor that clerks in his department do. They are all agents, with particular duties assigned to each, and are to the auditor what the deputy of the sheriff or the deputy of the clerk is to his principal, the term of the agent expiring with the term of his principal.

Section 25 of article 3 of the Constitution provides: "A treasurer shall be elected by the qualified voters of the State for the term of two years, and an auditor of public accounts, register of the land office and attorney-general for the term of four years." The duties and responsibilities of these officers shall be defined by law, provided that inferior State officers not specially provided for in this Constitution may be appointed or elected in such manner as shall be prescribed by law for a term not exceeding four years."

Section 10 of article 5 provides: "The general assembly may provide for the election or appointment, for a term not exceed-

ing four years, of such other county, district, ministerial or executive officers as shall, from time to time, be necessary and proper."

Section 6 of article 6 further provides: "Officers for towns and cities shall be elected for such terms, and in such manner, and with such qualifications, as may be prescribed by law."

In the Bill of Rights, article 18, section 28, is found this provision: "That the general assembly shall not grant any title of nobility or hereditary distinction, nor create any office the appointment to which shall be for a longer term than for a term of years."

The leading purpose of calling the convention of 1849 was to abolish the power of appointment to office for life and to substitute the elective system, with certain and fixed terms of office. In construing these several provisions of the Constitution relating to officers and their terms of office this court held, in the case of *Speed & Worthington v. Crawford*, 3 Met., —, that town and city officers should be elected, and the power conferred on the chancery court of Louisville to appoint certain officers for that city was adjudged to be in violation of article 6, section 6 of the Constitution, requiring all such officers to be elected. The attempt to vest the power of appointment in the chancellor was in plain violation of section 6, article 6 of the Constitution. The court in that case proceeded further to say that the act was unconstitutional because in violation of the provision of the Constitution requiring the legislature to prescribe the terms of other officers than those mentioned in the Constitution. Whether, if the power to appoint had been properly exercised, the court could have held the appointment void was not determined in that case, nor was the question as to the term of the office involved in the issue raised. Still the decision in that particular case does not affect the question here, nor were the officers in that case the agents of the chancellor, or authorized to perform any duty connected with the chancery court of Louisville.

In the case of *Offutt v. The Commonwealth*, 10 Bush, —, the question was whether the trustee of the jury fund was a county officer within the meaning of the Constitution, and if

so, were his sureties liable for his acts after the expiration of four years (the duration of his term), the trustee holding over? The statute provides that a trustee of the jury fund shall be appointed for each county by the circuit court, and shall hold the office for the term of four years.

This court said: "The office is of that class provided by section 10 of article 6 of the Constitution, as follows: 'The general assembly may provide for the election or appointment, for a term not exceeding four years, of such other county or district, ministerial and executive officers as shall, from time to time, be necessary and proper.'"

These cases are cited to show the limitation placed upon the power of appointment to office by the various provisions of the Constitution, and the action of this court in determining the application of these provisions to the particular cases; and in no instance has it been held, where the term of the principal has been fixed, it became necessary to prescribe the duration of the term of the agent or deputy acting under him. The expiration of the term of the principal must necessarily end that of the agent, and the mere fact that the agent may be assigned by the act creating him to the discharge of certain duties the principal is not required to discharge, or is not authorized to perform, will not, and does not, make the agent or his deputy such an officer in the meaning of any provision of the Constitution as requires that his term of office shall be defined. He is, nevertheless, the agent of the auditor, and the term being prescribed for the one, fixes a certain and defined term for the other, subject to the power of removal by the principal as authorized by the act.

It is argued, however, that the terms of office of the several clerks in the auditor's department have been fixed by law, and that this is a legislative construction of the provision of the Constitution referred to. The terms of the clerks in the auditor's office are fixed and end at the same time the term of the auditor expires, but this is no argument in favor of the position assumed by counsel in this case. The legislature doubtless deemed it unwise to place the power with the auditor of removing all his subordinates at his mere will, and, there-

fore, when the appointment is made, and the position assumed, it is irrevocable on the part of the auditor unless for cause. The clerk to that extent is made independent of the auditor, and the patronage of the latter, once bestowed, can not be withdrawn for any selfish purpose. While an office may be defined to be a public position or employment, and a deputy in that sense regarded as an officer, it was never contemplated by the framers of the Constitution that agents, clerks and subordinates of the principal officers of the State and counties should have their term of office defined. The term of the auditor being fixed, his clerks and agents under him subject to his supervision and control, and to enable him to execute or have executed all the duties of his office, are mere subordinates, whose terms end with the term of the principal.

It is said, however, that the agent is required to execute a bond, take an oath, etc. So of almost every deputy or agent of a State or county officer, and while these bonds are generally executed to the principal, the fact that the bond in this case is required to be executed to the Commonwealth, and approved by the auditor, can make no difference. The agent in the transaction of his business is not always under the eye of the auditor, and the legislature for that cause did not deem it just or proper to make the auditor personally responsible for his acts, but gave to the latter the general supervisory power over him, with the right to displace him at his will and pleasure. It seems to us the principal inquiry on this branch of the case is: Does this agent, when appointed, occupy a subordinate position to and under the auditor? If so, he is not an officer whose term should be fixed, for the reason already indicated, and the fact that his peculiar duties are assigned him, and those of the auditor enlarged by the act authorizing his appointment, does not affect the decision of the question made. The officer in this case can not, in a strict legal sense, be denominated an agent, but is a mere subordinate in a department, holding his office at the will of its chief officer, and it can not well be adjudged, under any reasonable construction of the Constitution, that the subordinate holds for a longer term

than the principal. The construction given the various provisions of the Constitution in this case carries out the legislative will, and violates no provision of the organic law.

In the third place it is maintained the act is void because it confers on the auditor or his agent the duties, power and emoluments of the assessor.

It is said the auditor's agent is required to do that which the assessor should do. It would be more aptly stated, in saying that the auditor or the agent is required to do that which the assessor has omitted to do, and which he has no power by virtue of his office to do. This act in no manner interferes with either the office of assessor or sheriff, or the emoluments belonging to either. The assessor and sheriff are both constitutional officers, with their terms prescribed by the Constitution and their duties defined by law. The assessor during his term of office is required to list the property within his county for taxation during each year, and to make a return of his assessor's books at a fixed period during each year to the county clerk. He is also required to return a delinquent list, and after discharging such duties for the current year his power over the subject-matter for that year ceases. He is without power to assess or revalue any property, but this is all left to the county court and the revisory board. Persons omitted to be listed, when reported by the sheriff, may have their property assessed by the county clerk. A board of supervisors is also constituted in each county with power to correct any error committed by the assessor, or report to the county court the names of persons omitted to be listed by him. (General Statutes, page 723, title "Revenue and Taxation.")

The power of the assessor is gone with the return of his books for the current year, and the right to supervise his action confided to certain county officers designated by the statute. The State, in addition to the board of supervisors, has authorized this agent of the auditor to give information, and take other steps in the county court of the county where the taxpayer resides, to enable the county court to rectify the errors, and supply the omissions of duty on the part of the

assessor, arising either from neglect on his part, or from an unwillingness on the part of the taxpayer to disclose his taxable estate. This agent is required to give information to a tribunal (the county court) that has always, under legislative authority, exercised this supervisory control, and in the exercise of this power we perceive no constitutional objection. It is no appropriation of the emoluments of the assessor to authorize another to correct his mistakes committed while in office, nor is his successor in office vested with any right by virtue of the office to supervise this work. The sheriff is required to collect the tax when ascertained by the county court, and it is only in cases where the party proposes to pay before any steps are taken against him that the agent is authorized to receive the money, or in cases where the money is paid after judgment and before execution. The party is delinquent and the sheriff has no power or right to collect the tax, and it is unreasonable to say that, in such cases, the money can not be paid directly to the agent or the auditor, but must pass through the hands of the sheriff. As the penalty attempted to be imposed for the failure to list the property, when no such penalty existed at the time of this omission of duty, can not be enforced; still it does not affect the substantial provisions of the act, or present any obstacle in the way of enforcing the collection of the tax. The act was evidently intended to clothe the county court with the authority to ascertain these delinquent taxpayers, and to compel them to contribute their portion of the common burden, and is retrospective in its operation. The penalty, therefore, may be disregarded in so far as it applies to a failure to list before the penalty was annexed; and when stricken out, "if that action remains complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which is rejected, it must be sustained" (Cooley's Constitutional Limitations, page 215). The right to enforce the penalty can be denied, and the main features of the act enforced. Our attention has not been called to each section of the act in question, or its practical operation, but it is plain that the county court should hear and determine the question made on the information of the relator Barker. This court is not to be understood as de-

ciding that if the relator held an office within the meaning of the Constitution, at the mere will of the legislature or the auditor, that his acts would be void or the act unconstitutional. It might well be argued, where the term had not been fixed beyond the constitutional limit, that the provision of the organic law will supply the defect in the act, and render it operative for the constitutional period. This latter question is reserved.

The judgment below is affirmed.

[The original action was filed in the common pleas court, and transferred to the Jefferson Circuit Court, and there decided.]

GAINES v. SCOTT.

(Filed December 3, 1881.)

1. The novation of a note, dated September 4, 1876, by altering it so as to make it bear eight instead of ten per cent. interest per annum operated as a release of the obligors, who did not consent to the alteration.

2. In an action on an alleged implied promise to pay borrowed money, for which the defendant and four others had executed their promissory note, it appearing that the defendant did not receive any benefit directly, or indirectly, from the loan, in order to authorize a recovery it must appear that the plaintiff loaned the money at the request of the defendant, and was induced by him to rely upon his promises or assurances and to forego other and better security.

3. Assumpsit is in the nature of an equitable action, and recovery upon an implied promise may be defeated by showing that, *ex æquo et bono*, the plaintiff ought not to recover.

4. Co-obligors are competent witnesses to prove that one was principal and the others his sureties.

Appeal from Henry Circuit Court.

Opinion of the court by Chief Justice Lewis.

On the 4th of September, 1876, a promissory note for \$3,000, payable twelve months after date, and bearing interest at the rate of ten per cent. per annum from date until paid, was given to appellant for money loaned, and signed in the order following by Chilton Scott, W. H. Stratton, C. T. Scott, Joseph Campbell and C. T. Chilton.

In 1878, by agreement between appellant and Chilton Scott, but without the knowledge or consent of the other parties to

the note, the face of it was so altered as to make the rate of interest eight per cent. per annum.

As it was lawful at the date of the note, as well as at the time it was altered, to contract for the payment of a rate of interest not exceeding eight per cent. per annum, but to intentionally charge ten per cent.; made the whole interest subject to be forfeited, the alteration of the note by appellant and Chilton Scott was a material one, and, therefore, as is well settled, operated to discharge the other obligors from all liability upon it.

It does not appear whether appellant attempted, after the alteration, to recover on the note or not. This action was brought by him against C. T. Scott alone, not upon the note, but upon an alleged implied contract to pay the \$3,000 it was executed for, and which, it is in the petition averred, appellant loaned and advanced to him and Chilton Scott, at his special instance and request, whereby he became liable to pay, etc.

In his answer appellee denies the money was loaned or advanced to him, or to him and Chilton Scott, but alleges it was loaned to the latter; that he (appellee) received no part of it, and did not hold himself out as being connected with Chilton Scott as principal in borrowing it or any part of it.

The verdict of the jury and judgment of the court being for defendant in the action, this appeal is prosecuted, and errors of the court in giving and refusing instructions, and admitting incompetent evidence are relied upon for reversal. But unless appellant has a right of action upon the implied contract he was not entitled to either the instruction refused or the one given.

To maintain an action upon an implied as well as upon an express promise, there must be a consideration, either prejudicial to the plaintiff or beneficial to the defendant, in the action to uphold it.

It is shown by both the pleadings and proof in this case that appellee did not get any part of the money loaned, the whole of it being received by and used for the benefit of Chilton Scott. As, therefore, appellee did not receive any benefit, directly or indirectly, from the loan, in order to authorize a recovery it must appear that appellant loaned the money at

the request of appellee, and was induced by him to rely upon his promises or assurances, and to forego other or better security for his debt.

It does not appear that appellant did in this case forego any advantage or security for his money, or that he has suffered any loss or injury in consequence of placing confidence in the undertaking of appellee. On the contrary, it is manifest that the money was loaned upon the security afforded by the note. For it was found upon the trial that appellant refused to loan the money upon the credit of appellee alone, but required the execution of the note by the other parties to it as a condition of, as well as security for, the loan. There is consequently no consideration whatever for the implied promise sued on.

Appellant complains that the court below improperly admitted upon the trial the evidence of the other obligors, which showed that Chilton Scott was the principal and all the others were his sureties in the note. We are of the opinion it was competent for appellee to prove by the parties to the contract the attitude they each occupied in the transaction.

From their testimony it appears that they were the co-sureties, and equally bound with appellee for the payment of the note. Such being the case, it is clear that the alteration of the note would, if appellee is held responsible upon the implied contract, have the effect of imposing upon him a greater burden than he undertook, by the express contract, to bear.

Assumpsit is in the nature of an equitable action, and recovery upon an implied promise may be defeated by showing that, *ex aquo et bono*, the plaintiff ought not to recover. In this case the appellant, in an attempt for his own advantage to increase the liability of the obligors to the note beyond what, by the terms of it, they were legally bound for, has discharged them entirely. Having done so, we do not think he has the right to recover upon an implied promise of appellee alone what he undertook to be bound for in common with his co-sureties.

It is not necessary to consider the question whether appellee, if he had been a beneficiary of the loan, would be liable upon an implied promise.

For the reasons indicated the judgment must be affirmed.
Judge Hargis dissenting.

W. P. Thorne, Carroll & Barbour and Webb & Masterson for appellant.

Harwood & Carroll for appellee.

MENDERSON, &c. v. SPECKER, &c.

(Filed October 8, 1881.)

1. A summons may be served by any officer to whom it is, or might have been, directed.

2. An attachment may be executed by an officer to whom it is directed, but not by one to whom it is not directed.

3. Debt may be attached by delivering a copy of the order, with a notice specifying the debt or demand, to the person owning it. Held also that—

Subsection 3 of section 203 of the Civil Code "is intended to supply the holder of such property attached, or a debtor owning a debt or demand which is sought to be garnished, with notice of what property, debt or demand is attached or garnished; and until such notice is served it can not be said that the attachment is legally executed."

4. Attachment, accompanied by the statutory notice, specifying the debt attached, has priority over another attachment previously executed, but not accompanied with the statutory notice.

Appeal from Bourbon Circuit Court.

Opinion of the court by Judge Hargis.

The appellees, on the 17th of February, caused a general attachment against the property of Maddox to be issued and directed to the sheriff, which was on that day served upon Boyd as garnishee by a constable.

On the next day thereafter the appellants also sued out an attachment against Maddox's property, and had it directed to the sheriff or any constable.

It was served upon Boyd by a constable, who delivered to him a copy of the attachment.

Thereupon the appellees caused a second attachment to issue directed to the sheriff, who executed it upon Boyd by delivering to him a copy of the attachment, with a notice specifying the debt attached endorsed on the back of it.

Boyd paid the amount of the debt owing by him to Maddox into court, and it was adjudged that appellees had obtained priority to the fund under their attachment over the appellants, who prosecute this appeal to reverse that judgment.

Any officer to whom the summons is, or might have been, directed may serve it according to section 47, Civil Code, but this is not the case with reference to the service of attachments, as there is no provision of the Code which authorizes the service of an attachment by any officer to whom it might have been directed, but to whom it is not in fact directed.

The absence of such a provision applicable to attachments, taken in connection with the fact that there is such a provision found in section 47 applicable to summonses, tends strongly to the conclusion that the legislature did not intend to authorize the execution of an attachment by any other officer than those to whom it is directed.

And this position is strengthened by subsection 2 of section 667, which expressly provides that an order for a provisional remedy may, at the request of the party in whose behalf it is issued, be directed to any of the officers named in the first subsection, who is not a party to, nor interested in, the action. The officers named in the first subsection are sheriff, coroner, jailer and constable.

It must, therefore, follow that the service of appellees' first attachment by the constable, when it was alone directed to the sheriff, was illegal.

As appellees' second attachment and appellants' only attachment were each executed by the officer to whom it was directed, the question of priority must be determined by the manner in which the attachments were executed.

Subsection 3 of section 203, Civil Code, provides that an order of attachment shall be executed "upon other personal property (meaning such as is incapable of manual delivery) by delivering a copy of the order, with a notice specifying the property attached, to the person holding it; or, as to a debt or demand, to the person owning it."

This subsection is intended to supply the holder of such property attached, or a debt or owing a debt or demand which is sought to be garnished, with notice of what property, debt, or demand is attached or garnished, and until such notice is served it can not be said that the attachment is legally executed.

And we are not inclined to enter into a discussion of the reasonableness of the statute as the law is thus written. But in view of the certainty and protection to all parties interested, that must necessarily follow a literal compliance with the provision named, we can see no great hardship in enforcing its imperative requirements.

As the execution of appellees' second attachment was accompanied by the statutory notice, they were properly adjudged priority over the appellants, whose attachment was not executed in conformity to the subsection named.

Judgment affirmed.

Ross & Kennedy for appellants.

Ben G. Paton for appellees.

WARFIELD, &c. v. GARDNER'S ADM'RS.

(Filed December 8, 1881.)

1. Order appointing administrator presumed to have been duly made by county court.

Allegation that the administrators were by an order of the Hardin County Court appointed administrators of their decedent, and qualified as such, is a substantial compliance with section 122 of the Code.

The law raises the presumption that the order, when made, was duly made.

2. Defect in petition—Accidental omission of the words "the defendants," the subject of the verb "agreed," did not affect the substantial rights of the defendants, because they were not prejudiced or misled thereby.

"The omission of those things which are silently expressed is of no consequence."

3. Objection that the petition fails to state facts showing that the county court had jurisdiction to appoint the administrators involves their want of legal capacity to sue, and can be taken advantage of by special demurrer only.

4. A set-off or counterclaim against decedent in action by his administrator must be verified by the written affidavit of the claimant and proof of the justice of the claim, but a previous demand thereof of the administrator is not required.

Appeal from Hardin Circuit Court.

Opinion of the court by Chief Justice Lewis.

This is an action by appellees, administrators of the estate of A. S. Gardner, deceased, upon a promissory note given by appellants.

January, 1882—2

At the September term, 1877, of the court, a general demurrer to the petition was filed and overruled. Thereupon appellants filed their answer, in which one of them, Warfield, pleaded a demand against the estate for rent of land as a set-off. At the February term, 1879, a rule was made by the court requiring Warfield to show that he had made a demand of appellees for payment, accompanied by his affidavit and proof of the claim as required by law in such cases. At the same term, appellants having failed to respond to the rule, judgment was rendered making the rule absolute, and dismissing the set-off, and also for the amount of the debt claimed in the petition. But upon grounds filed a new trial was granted.

At the August term, 1879, Warfield filed a response to the rule, stating in substance that he had, on the 20th of August, 1879, demanded of the administrators payment of his claim, and also filed copies of certain title papers and affidavits of other persons in regard to the land, the rents from which he claimed as set-off.

Upon filing the response appellants asked leave to refile their set-off, which was refused, and judgment again rendered for the debt claimed in the petition.

From that judgment this appeal has been taken.

The only questions presented by the assignment of errors necessary to be considered are:

1st. Whether the demurrer to the petition was properly overruled.

2d. Whether the court erred in refusing to permit appellants to refile their answer and set-off.

1st. The allegation in the petition that appellees were, by an order of the Hardin County Court, appointed administrators of A. S. Gardner, deceased, and qualified as such, is a substantial compliance with section 122, Civil Code. The law raises the presumption that the order, when made, was "duly" made.

The defect of the petition on account of the accidental omission of the words "the defendants," the subject of the verb "agreed," does not affect the substantial rights of appellants, because they were neither prejudicial nor misled thereby. "The omission of those things which are silently expressed is of no consequence."

The objection that the petition fails to state facts showing that the Hardin County Court had jurisdiction to appoint appellees administrators involves their want of legal capacity to sue, and can be taken advantage of by special demurrer only, and as no special demurrer was filed in the court below that objection must be regarded as waived by appellants.

As to the second question: This court, in the case of *Millett v. Watkins*, 4 Bush, 642, in construing section 473 of the Civil Code of 1854, held that a set-off is neither in the common nor legal acceptation of the word a "suit" or "action," and, therefore, that the demand required to be made by a claimant before bringing a suit or action against a personal representative did not apply to a set-off. It was not, however, decided in that case that the verification of the claimant by written affidavit and proof of the demand could be dispensed with.

But by subsection 34, section 732 of the present Civil Code, the word "action" is construed to embrace a demand for a set-off or counterclaim, and by subsection 37 the word "sue" is construed to refer to an action or special proceeding.

If a set-off is to be considered an action in the meaning of section 37, chapter 39, General Statutes, and that section is literally enforced, no set-off can be pleaded or recovery had by it for a claim against the estate of a deceased person until such affidavit and proof are made, nor until demand of payment thereof has been made of the personal representative, accompanied by affidavit of its justice.

The reason for requiring a claimant before bringing an original action against a personal representative to make demand of him for payments is that, if the claim is just and properly proved, it may be paid without subjecting the estate to the costs of litigation. But the reason for requiring the demand to be made ceases when the personal representative begins litigation himself. Though such is not the case in respect to the affidavit of the claimant and proof of the justice of the claim. And we are of the opinion that both the letter and spirit of the law, as it now is, requires that a claim against the estate of a decedent which is pleaded as a set-off or counterclaim should be verified by the written affidavit of the claimant and proved

in the manner required by law in the case of claims sued upon by original action. And that the personal representative may, when the defendant has not complied with the law in this respect, obtain a rule against him. And upon his failure or refusal after such rule to verify and prove the claim in the manner required by law his set-off or counterclaim should be dismissed.

Though in this case it is alleged in the answer of appellants that the demand is just and has never been paid, and that there is no set-off or discount against the same, nor any usury therein, it does not appear that the claim was either presented or filed in such manner as would authorize the personal representative to admit or controvert its justice. It should have been verified by the written affidavit of the defendant, and also proved in the manner required by law and filed with the answer.

The response of appellants to the rule against them was insufficient, and as their set-off had been once dismissed for failure to comply with the law in such cases, the court did not err in overruling their motion to refile it as the claim attempted to be pleaded as a set-off was not so verified and proved.

Wherefore, the judgment is affirmed.

BARBEE v. FOX, &c.

(Filed December 10, 1881.)

1. Nonresidents may make motion to have action retried at any time within five years after judgment against them on constructive service.

2. Nonresidents may make motion to retry motion to confirm report of sale of land, and file exceptions to the sale at any time within five years after the judgment of confirmation was rendered.

3. It is not necessary that a motion to retry should be entered in *hac verba*. A substantial compliance with the requirements of the Code is sufficient.

4. An order confirming decretal sale of land made after death of the defendant was void in this case.

5. Three years' time to redeem land sold to satisfy a contractor's lien, under the charter of 1851 of the city of Louisville, was required to be reserved in the order of the court confirming the sale.

An order confirming such a sale was properly set aside in this case because it did not give the three years' time to redeem, and a new order of confirmation giving the three years' time to redeem from the date thereof is affirmed.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Lewis.

In 1855 McAtee brought an action in the Louisville Chancery Court under an act of the general assembly, entitled "An act to charter the city of Louisville," approved March 24, 1851, for the purpose of enforcing his lien as contractor upon certain lots of land belonging to Thos. W. Fox. In pursuance of the judgment rendered in the action the lots were, on February 28, 1857, sold by the marshal of the court and purchased by appellant Barbee. The sale was reported to court, approved and confirmed, and a deed made to appellant.

Thos. W. Fox was at the time a nonresident of the State, and before the court by constructive service of process only, and it now appears died between the time the sale was made and the order of court confirming the report of sale.

June 25, 1869, the action was reinstated on the docket, and McAtee, for the use of Barbee, filed a supplemental petition for the purpose of having the report of sale again approved and confirmed.

The heirs at law of Thos. W. Fox, deceased, were by the supplemental petition made parties to the action, and brought before the court by constructive service of process.

June 24, 1870, the action being submitted for trial, an order of court was made again approving and confirming the report of sale made in 1857.

June 28, 1875, appellees, heirs at law of Thos. W. Fox, filed in court a paper called by them an answer and cross petition. In it they allege they were nonresidents and ignorant of the proceedings had in the action until a few days before filing their answer and cross petition; that no bond was executed by the plaintiff as required by the Civil Code previous to the order of June 24, 1870; that the right to redeem the lots within three years, as provided in the act under which the proceedings were had, was not reserved to them in the order of confirmation; that one of the defendants in the action has since his birth been of unsound mind and incapable of transacting business, and was not represented in the action previous to the confirmation of the sale by a guardian or committee; and that the entry of Barbee upon the lots was wrongful, and his attempt to convey the same to Ray was fraudulent on the part of both of them. They asked for possession of the lots; that the order

of June 23, 1870, be set aside, and they be permitted to pay the debts due on the lots and satisfy the judgment against their deceased father, Thos. W. Fox.

September 24, 1875, appellants moved the court to strike from the files the answer and cross petition. And October 9, 1875, appellees filed exceptions to the report of sale made by the marshal in 1857.

November 3, 1876, the court made an order sustaining the motion to strike from the files the paper filed June 23, 1875, so far as it purported to be an answer and cross petition, but retaining it as a motion for retrial of the application to confirm the marshal's report of sale and as exceptions to said report.

June 30, 1879, the court rendered judgment. By that judgment the order of June 23, 1870, confirming the report of sale was set aside, the exceptions filed by appellees overruled, and the sale finally approved and confirmed; but to appellees was reserved the right at any time within three years from the date of the judgment to redeem the property sold by paying to Barbee, the purchaser, the sum bid by him and interest thereon at the rate of ten per cent. per annum, from February 23, 1857, until paid, and all taxes and levies made subsequent to the sale; and if not redeemed the sale to be final. An order was also made restoring the possession of the lots to appellees.

From that judgment this appeal is prosecuted, and the objections made to it will be considered.

So much of section 445, Myers' Code, as applies to this case is as follows: "When a judgment has been rendered against a defendant or defendants constructively summoned, and who did not appear, such defendants, or any one or more of them, may at any time within five years after the rendition of the judgment appear in court and move to have the action retried, and security for costs being given they shall be admitted to make defense; and thereupon the action shall be retried as to such defendants as if there had been no judgment; and upon the new trial the court may confirm the former judgment or modify or set it aside," etc.

Appellants contend that appellees did not within five years from the time the order of confirmation was made appear in

court and move to have the action retried as required by that section of the Code.

It is true the record does not show that they complied literally with the requirement of the Code by making a formal motion to have the action retried. They did, however, give security for costs, and file their answer and cross petition in open court. In our opinion it is not necessary that a motion to have the action retried be entered in *hæc verba*. The execution of the bond for costs, and order of court directing their pleading to be filed, imply both the appearance of appellees in court and motion for retrial.

Appellants contend also that the court erred in permitting appellees to file exceptions to the report of sale on the 9th of October, 1875, which was after the expiration of five years from the order of confirmation, and also overruling their motion to strike from the files the paper filed by appellees June 23, 1875, and treating it as a motion for a retrial of the application to confirm the report of sale, and as exceptions thereto.

Appellees having, within five years from the date of the order of confirmation, acquired a standing in court by a substantial compliance with the requirement of the Civil Code, and also filed a paper which, though called by them an answer and cross petition, was subsequently permitted by the court to remain on file and be treated as exceptions, had the same right to amend their pleading or proceeding as they would have had under section 161, Myers' Code, if they had been present in court before the order was entered. In our opinion, therefore, it was not an abuse of the discretion given to the court in such cases to permit the exception to be filed October 9, 1875.

The paper filed the 23d of June, 1875, can not be properly considered a motion for retrial because the filing it followed, and was the result of the motion. But so far as it contained exceptions to the report of sale, or grounds for setting aside the order of confirmation, it was proper to retain and so consider it. And it was even proper to file it as an answer to the supplemental petition of appellants; and being filed as such the only way it could have been properly disposed of was by demurrer, and that would have reached to the supplemental petition.

In the latter were two allegations: First, that John W. Fox died previous to the first confirmation of sale; second, that Barbee took and held possession of the lots in good faith, and, believing them to be his own, sold to Ray. The first allegation is a statement of a fact that rendered the first confirmation of sale void, and changed his attitude from that of a rightful owner and holder of the property to that of a mere bidder at the sale. The other we do not consider material. Nor is it now important how the paper, filed by appellees June 23, 1875, considered as a pleading, was disposed of, as the only questions necessary to be determined are presented by the exceptions contained in it, and the paper filed October 9.

The questions thus presented are:

1st. Whether the court erred in setting aside the order of confirmation made June 24, 1870, and again approving and confirming the report of sale.

2d. Whether the right of appellees to redeem the property terminated at the end of three years from June 24, 1870, or continues three years from the date of the judgment appealed from.

The judgment enforcing McAtee's lien having been rendered more than five years before appellees appeared in court and moved to have the action retried, can not be now vacated or set aside. But appellees having given security for costs and been admitted to make defense before the expiration of five years from the order of June 23, 1870, section 445, Myers' Code, required the issue as to the confirmation of the report of sale to be retried as to them as if there had been no order of confirmation, and upon the retrial the court had the power to confirm that order or modify or set it aside. And every defense or objection they could have made to the motion to confirm the report of sale before it was done, as well as every motion they might have made to modify or set aside the order of confirmation after it was entered, if they had been present by actual service of summons, they had the right to make upon the retrial.

There does not appear sufficient grounds for rejecting the report of sale, and the order of June 24, 1870, so far as it approved and confirmed that sale, was proper and valid, and the

court erred in setting it aside. But section 5, article 7 of the act of 1851, before referred to, requires that "the court confirming any sale made under such decree shall direct that the property be redeemable at any time within three years by the owner on paying the principal sum and interest at the rate of ten per cent. per annum, and all taxes and levies made subsequent to the sale thereof, and if not redeemed within the time specified that the sale shall be final; and after the time for redeeming shall have expired the court shall cause a conveyance to be made to the purchaser by a commissioner."

By the order of June 24, 1870, the sale to Barbee was approved and confirmed absolutely without a reservation of the right given by the act to appellees to redeem, and the commissioner of court was directed to execute to him a deed while he was left in possession of the property that he had held for years under the previous void order of confirmation, and to which he had no right until the expiration of three years from the date of the order of confirmation.

By section 800, Myers' Code, the court had the power at any time within sixty days from the date of that order, and if appellees had within that period appeared in court and moved therefor, it would have been the duty of the court to have so modified it as to reserve to them by the terms of the order the right to redeem within three years; to have set aside so much of it as directed the deed to be made to the purchaser before the end of that period, and to have so amended it as to require him to deliver the possession of the property to be held by them while their right to redeem existed.

Upon the new trial provided for by section 145, the court had the power, and in our opinion it was its duty, to ascertain and secure in the judgment appealed from, as was done, these rights of appellees, which were either denied or omitted to be reserved to them by the order of June 23, 1870. Consequently the error of the court in setting aside, instead of modifying, that order does not affect the substantial rights of the parties.

2d. It is contended by appellants that the right to redeem being recognized and provided for in the judgment directing

the property to be sold, it was not essential that the right should, in express terms, have been reserved in the order of confirmation.

A sufficient answer to that position is that the statute under which the proceedings were had expressly required the court confirming the sale to direct that the property be redeemable within three years, and also provided that no deed could be made to the purchaser until the end of that period.

The effect of the order of June 24, 1870, as it stood, was to deprive appellees of the title and the possession, as well as the right to redeem the property. And as neither the right to redeem was given nor the terms upon which appellees might exercise that right prescribed until the judgment appealed from was rendered, it follows that the limitation of three years should not begin to run against them before that time.

As the act of 1851 requires the owners of property sold in such cases as this to repay to the purchaser only taxes or levies made subsequent to the sale, the court had no right to require appellees, as a condition of the right to redeem, to pay those which may have been made previous to the sale.

Wherefore, the judgment of the court below is affirmed.

Geo. B. Eastin and Russell & Helm for appellants.

J. R. Boone for appellees.

FARMERS AND DROVERS INSURANCE CO. v. GERMAN
INSURANCE CO.

(Filed December 13, 1881.)

Release of prior mortgage, procured by fraud of mortgagor and mistake of mortgagee, did not inure to the advantage of or give priority to the subsequent mortgagee in this case, in which no injustice was done to the subsequent mortgagee by restoring the holder of the prior mortgage to the rights secured to him by that mortgage.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Lewis.

In May, 1874, George P. Doern gave to appellant his promissory note for \$2,500, bearing interest at the rate of nine per cent. per annum from date, and at the same time to secure its

payment he and his wife executed a mortgage on certain real property on Green street, in the city of Louisville, which was in June, 1874, duly recorded.

July 24, 1876, Doern and one Stein gave their two joint promissory notes to appellee for \$1,700 each, due three years after date, and bearing interest at the rate of nine per cent. per annum from date. And to secure the payment thereof they and their wives on the same day executed a mortgage to appellee upon several lots of land belonging to them respectively, one of which lots, the property of Doern, was the same previously mortgaged to appellant.

May 1, 1878, Doern gave to appellant a new note for \$1,600, which was the balance of the first note, after deducting payments made. And on the same day, to insure its payment, he and his wife executed a mortgage upon the Green street property previously mortgaged. The last mortgage was acknowledged June 19, 1878, and on the next day appellant, by its president, made an entry upon the margin of the record book releasing the lien retained in the first mortgage.

This action was brought by appellee to recover judgment for the balance due of the two notes given by Doern and Stein, and to enforce its lien upon the mortgaged property, including the lot mortgaged to appellant. The executor, widow and heirs at law of George P. Doern, who died November 12, 1878, and appellant were made parties defendants to the action, and appellant was called on to set up any claim it might have to the property.

Appellant filed its answer, made a counterclaim against appellee and cross petition against the executor, widow and heirs at law of George P. Doern, deceased. And in it alleged, in addition to the facts already mentioned, substantially that after the first note given to appellant fell due Doern, though repeatedly requested to pay or renew it, evaded doing either until about the 1st of May, 1878, when the note for \$1,600, which bore six per cent. interest, and the second mortgage were executed; that appellant, confiding in the integrity and good faith of Doern, made no examination of the record for mortgages upon the property, but released the first mortgage

and accepted the second under a mistake of fact, and by reason of the fraudulent failure of said Doern to disclose the existence of appellee's mortgage, of which he was aware, appellant, its officers and agents, were at the time ignorant; that the estate of said Doern was when the second mortgage was executed and is now insolvent; and that as soon as the existence of appellee's mortgage was discovered appellant caused it to be notified of the mistake, and that appellant would insist upon its priority of lien. In its answer appellant prayed for judgment for its debt, the correction of the alleged mistake, the cancelment of the release and enforcement of the first mortgage.

The court below having sustained the demurrer to the counterclaim filed by appellee and dismissed it, this appeal is prosecuted, and for the purposes of the demurrer the allegations of appellant must be taken as true.

Appellant seeks relief upon the grounds of both mistake and fraud.

The first question to be considered is whether appellees, not having either participated in the alleged fraud or been connected with the transaction in which the mistake on the part of appellant occurred, ought to be deprived of the advantage thus acquired by it in order to afford relief to appellant. The determination of that question depends upon how appellee obtained the advantage it now seeks to avail itself of, and whether its attitude in this case is such as to invoke the aid or protection of a court of equity.

The maxim "the laws assist those who are vigilant, not those who sleep upon their rights," does not, as urged by counsel, apply to this case. For the apparent advantage appellee may have is the result not of negligence, but mistake of appellant and fraud alleged to have been committed against it.

It is not sufficient that appellee be innocent of the alleged fraud, and disconnected with the transaction in which the mistake occurred in order to profit by the misfortune of appellant.

If it "has not loaned any money, or done any act on the faith or strength of the release of the first mortgage, * * * has not given up any security, divested itself of any right or placed itself in a worse condition than it would have been"

but for the release by appellant, it is not wronged or injured, and, therefore, not entitled to any remedy for relief in this case.

It is needless to refer to all the cases cited by counsel, for if appellant is entitled to relief as against Doern upon the ground of fraud or mistake, particularly the former, it is difficult to conceive upon what principle of reason, justice or policy appellee may interpose to prevent it. In the case of *Barnes v. Cammack*, 1 Barbour, 398, which is similar to this, the court used the following language: "Brown not having parted with any property or right, nor placed himself in any worse condition in consequence of plaintiff having canceled her first mortgage, but having acquired a superior title by reason of her mistake, this court can not permit him to retain it to the injury of the plaintiff; we must give preference to the equity of the latter. * * * The principle upon which this case is decided, and which runs through all cases of this description, is that when the legal rights of the parties have been changed by mistake, equity restores them to their former condition when it can be done without interfering with any new rights acquired on the faith and strength of the altered condition of the legal rights, and without doing injustice to other persons."

In this case the legal rights of appellant have been changed not merely by mistake, but also by fraud. Relief, therefore, is sought, and as it can be afforded to appellant without interfering with any right acquired by appellee upon the faith of the changed condition and without doing it any injustice, the attitude of appellee is that of a mere volunteer in the issue, which is really between appellant and the executor, widow and heirs of Doern. And as they have not denied the allegations made by appellant they must be taken as confessed by them. Consequently the only question remaining that it is necessary to decide is whether the allegations are sufficient to sustain appellant's cause of action against them, and authorize the relief sought by it.

The allegations relevant to this issue are that at the time of the release of the first mortgage appellant and its officers were ignorant of the existence of appellee's mortgage, of which Doern was aware, and did not examine the records because of the confidence reposed in him, of which fact he was also aware,

and that the release was made by a mistake, and because Doern fraudulently concealed what it was his duty to disclose.

Though mortgagees are bound to examine the record in regard to titles to real property, and in the absence of representations made in respect thereto by the mortgagor must be presumed to have done so, yet they may rely upon such representations; and if so relying act under a mistake of fact they will be relieved of the consequences of such mistake, and if the representations are fraudulently made the consequences should fall upon them who make them.

In this case, though no representations are alleged to have been made by Doern, it is alleged that appellant and its officers acted upon the belief that the property was at the time of the release unincumbered by other mortgages, and that such belief was induced by the conduct of Doern; and knowing such to be the case he fraudulently concealed the existence of appellee's mortgage, whereby appellant was injured and he was benefited at least to the extent of the difference between the rate of interest of the first and second notes.

In our opinion, therefore, as the record stands, appellant is entitled to the relief sought.

Wherefore, the judgment of the court below is reversed and the cause remanded, with directions to overrule the demurrer to the counterclaim and for other proceedings consistent with this opinion.

Beattie & Winchester for appellant.

Alex. P. Humphrey for appellee.

LINCOLN COUNTY COURT v. L. & N. R. R. CO.

(Filed December 12, 1881.)

1. Railroads are liable to taxation for county purposes equally and uniformly with the property of a citizen.

2. The listing and assessment of the railroad's property was illegally done in this case.

3. Correct mode of assessing railroads and enforcing the collection of taxes levied thereon by county court for county purposes is fully set forth in the opinion herein.

The listing and assessment were illegal in this case, because not made in the mode required by the statute.

Appeal from Lincoln Circuit Court.

Opinion of the court by Judge Hargis.

The act to make taxation equal and uniform in counties where an ad valorem tax is levied by the county court, approved March 17, 1876, provides "that whenever the county court of any county in this Commonwealth shall, by virtue of any power conferred by law, order and direct an ad valorem tax to be assessed, levied and collected in said county, it shall be the duty of the assessor of said county to proceed to assess, at his regular assessment, all the property in said county not specifically exempted from taxation by virtue of section 3, article 1, chapter 92, General Statutes, title 'Revenue and Taxation.'"

By section 2 it is made the duty of the chief officer or agent of any railroad company owning property in said county, residing therein, to list or cause to be listed with the assessor of said county all the property of said railroad situate in said county, and it is provided if they fail or refuse to do so upon demand made upon them by the assessor, or if no such officer or agent reside in said county, then the assessor shall ascertain the value of the property and list the same.

Section 3 declares "that all the property thus listed and assessed shall be subject to an equal and uniform rate of tax."

The great principle underlying taxation is virtually embraced in the title of this act, which requires the taxes for county purposes to be equal and uniform upon all property situate in the county, whether it be owned by natural or artificial persons.

And no reason suggests itself why the property of a railroad corporation shall not be taxed equally and uniformly with the property of the people in State and county, nor do we perceive any constitutional objection to any of the provisions of the act.

Although it was said in the case of Applegate, &c. v. Ernst, &c., 3 Bush, 650, that a railroad can not be a fit subject for local taxation by the separate counties through which it runs, yet an examination of that case will show that there was no necessity for such an affirmation, as the question was not necessarily raised. The decision was based on the ground that the railroad could not, to any extent, be liable for the county subscription to itself for the purpose of completing its construction

And at that time there was no legislative act specifically authorizing county courts to assess taxes upon railroads for ordinary county purposes.

And in the case of the E. & P. R. R. Co. v. Trustees of Elizabethtown, 12 Bush, 288, this court said: "Whilst we appreciate the difficulties and the possible evils that may attend the fragmentary taxation of railroads in consequence of the peculiar character of such property, we perceive no constitutional objection to the authority conferred by the legislature upon the municipality of Elizabethtown." (*City of Ludlow v. The Trustees of the Cincinnati Railway, &c.*, 78 Ky., 358.)

The authority mentioned being the power conferred on the trustees to levy and collect a tax on railroad companies for all property owned by said companies in the limits of said town, except rolling stock, such as freight and passenger cars.

The case was reversed because of the illegal manner in which the collection of the taxes were sought to be enforced, and not on the ground that the taxes were either illegally listed or assessed.

And in that connection the court said: "The collection of these taxes can be enforced only under the supervision of a court of equitable jurisdiction."

It will be noticed, as in the authority conferred upon the trustees of Elizabethtown, that the mode of collecting the taxes is not prescribed in the act of March 17, 1876, but it is a general law upon the subject it treats, and the object of the legislature was to subject the property of railroads to the character of taxation mentioned in the act as the property of the citizens of the county is subjected to it.

The rule quoted was peculiarly applicable to the case then before the court because a ministerial officer of Elizabethtown had levied upon and was proceeding to sell the cars belonging to the railroad, and in view of "the inconvenience to the general public which would result from interference by ministerial officers with the operation of great lines of travel and commerce" we agree that the collection of such taxes out of property which can not be taken without interfering with the operation of the road ought not to be enforced except under the supervision of a court of equitable jurisdiction.

It follows, therefore, that the levy by the sheriff upon the tenement houses belonging to the appellee, wherein it boarded its hands who were engaged in operating its road, was illegal, and the court rightfully perpetuated the injunction as to the levy and contemplated sale.

But the proceedings of the county court in listing and assessing the appellee's property situated in Lincoln county presents a more serious question.

The county attorney gave information to the county court that the appellee had failed to list its property for taxation for county purposes for the years 1876 and 1877, and on his motion summons was issued against appellee requiring it to appear at the next term and list its property for such taxation.

The act of February 23, 1874, entitled "An act to amend article 3 of chapter 5 of the General Statutes," which attempted to make it the duty of the county attorney to give information to the county court of the failure of any person, since January 10, 1856, to list his property with the assessor, was declared by this court, in *Pennington v. Woolfolk*, to be unconstitutional and void, hence the provisions of that act furnished the county attorney of Lincoln no authority to give such information or make the motion for the summons.

By the provisions of section 21, article 5, chapter 92, General Statutes, it is made the duty of the assessor, when he returns his tax book, to return the names of all persons who have failed or refused to give a list of their taxable property.

And by section 25, *ibid*, it is made the duty of the sheriff to report to the county clerk any person who failed to give in a list of his taxable property to the assessor.

Upon the return of the assessor or the report of the sheriff it is prescribed in said article that the county clerk shall issue a summons against the delinquents, and the county court shall try them, and either list the property and fine them or permit such as are not in willful default to list with the clerk.

And section 24 makes it the duty of the county attorney to prosecute the delinquents, for which he receives 80 per cent. of the fines. But nowhere is he authorized to return or report delinquents, and then become their prosecutor and receive thirty per cent. of the fines.

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It was not shown to the county court that the assessor had returned or the sheriff reported the appellee as a delinquent, and we are of the opinion the county attorney failed to show such a state of facts as authorized him in the name of the appellant to prosecute the appellee as a delinquent under the provisions of article 5, chapter 92, General Statutes.

And according to the terms of the act of March 17, 1876, which we have been considering, before the assessor has power to list the property of a railroad company its chief officer or agent residing in the county must have failed or refused to do so upon demand made upon them by the assessor, or it must appear that no officer or agent of such company resides in the county.

Whenever the assessor makes the demand and the officer or agent of the company refuses to list the property, or there is no such officer or agent in the county, it becomes the duty of the assessor to ascertain the value of the property and list it. But should the company fail or refuse to list its property, by its agents resident or located in the county, or should the company have no such officer or agent in the county, and by the want of sufficient information or the willful failure or refusal of the company to list its property the assessor should be unable to value or list the property, upon a return of such facts by him or the report thereof by the sheriff after the assessor has returned his tax book it would be the duty of the county attorney to prosecute, of the county clerk to issue the summons, and of the county court to try such delinquents in the same manner as other delinquents are proceeded against for failure or refusal to list their property when it is liable to taxation.

But to this view of the law it is objected that while the county court may try and fine delinquents, it can not enforce its judgment against a railroad. This would be true if the county court or the ministerial officers authorized to enforce its judgment should attempt to do so by levying or seizing any part of the railroad or of the property of the company necessary to, or ordinarily used in, the operation of its road.

Yet the county court has jurisdiction to enforce the listing of property and render judgment for the fines and multiplied taxes inflicted upon delinquents when the proceedings against

them are in conformity to law, and whenever it does not interfere with the operation of the railroad the ministerial officers authorized to collect taxes may levy upon the property of the company and sell it, as they may levy upon and sell the property of individuals for taxes.

And should the company have no property by the sale of which the taxes could be collected without interrupting the operation of its road, the county may bring its action in equity to enforce the judgment for the taxes thus assessed upon the property listed.

As neither the general law nor the act of March 17, 1876, were complied with, and as both should have been treated as one law and pursued, we are of opinion the listing and assessment of appellee's property was illegally done, but we are also of opinion that its property is subject to the tax, and upon proper proceedings had it may be compelled by the county court to list it for taxation.

Wherefore, so much of the judgment as perpetually enjoins the appellant from assessing the property of the appellee or collecting taxes from it for county purposes is reversed and cause remanded, with directions to modify the injunction in accordance with this opinion.

W. H. Miller for appellant.

Hill & Alcorn for appellee.

WEDDINGTON, &c. v. COMMONWEALTH.

(Filed December 10, 1881.)

1. Liability of bail for appearance of accused who has absconded through fear of losing his life by mob violence.

In such case the bail must show that the constituted authorities were unable or unwilling, when properly called upon, to protect the accused in making his appearance.

2. Act of God—This case does not come within the category of cases where the accused is prevented from appearing by the act of God.

Appeal from Elliott Circuit Court.

Opinion of the court by Judge Hines.

The question in this case is whether appellants, who were bail for one Conn, charged with murder, are exonerated be-

cause the accused could not appear without danger of losing his life by mob violence. The evidence shows that at that time the county of Elliott, in which the proceedings were had, was overrun by a band of so-called regulators; that they had killed several persons and had shot and seriously wounded the accused, and had threatened to take his life whenever they might find him, and that by reason of these threats the accused was compelled to abscond.

It is contended by counsel that as it is the duty of the Commonwealth to protect the lives of her citizens, that it ought not to require the citizen to discharge any duty or to comply with any obligation when such protection is not extended, and that the bail should be exonerated as in case of sickness of the accused which renders it physically impossible for him to attend in response to his bond. This ought unquestionably to be true when the constituted authorities are unable or indisposed, when properly called upon, to protect the citizen in the discharge of the duty, but in this case appellants made no application for protection to the accused, and do not in any way show that the authorities were either unable or unwilling to extend the protection necessary to enable the accused to appear. It does not come in the category of cases where the accused is prevented from appearing by the act of God.

Judgment affirmed.

Judge Hargis not sitting.

J. W. Hannah, M. M. Redwine, Z. T. Young and V. B. Young for appellants.

WADE v. COMMONWEALTH.

(Filed December 1, 1881—Not to be reported.)

1. In courts of justices of the peace the same strictness of pleading is not required as in circuit courts.

2. Written information or pleading is not required in prosecutions in justices' courts.

3. The warrant of arrest or summons is issued by the justice on information given, and the summons in a penal prosecution merely commands the officer to summon the accused to appear, etc.

4. Peddling without license—This offense is sufficiently described in the warrant as set forth in the opinion herein.

Judgment of justice imposed a fine of \$100. On appeal the circuit court imposed a similar fine. The latter judgment is affirmed.

Appeal from Monroe Circuit Court.

Opinion of the court by Judge Pryor.

The appellant was tried before a justice of the peace and fined \$100 for peddling without a license. The warrant or summons charges the appellant with the offense of peddling in Monroe county, Kentucky, alleging "that in August, 1879, he unlawfully peddled goods by then and there selling goods, wares and merchandise, consisting of shoes, prints, sugar, coffee and notions of all kinds without a license so to do, contrary to the form of the statute."

The fine was imposed by the justice, and an appeal taken to the circuit court as authorized by the statute. There was a demurrer to the warrant, both in the justice's and circuit court, and the demurrer overruled. The facts clearly establish the guilt of the accused, and the only question presented here or necessary to consider is, is the warrant sufficient?

The same strictness of pleading is not required in a court of justice of the peace as in the circuit court. No written information or pleadings is required in prosecutions in justices' courts. The warrant of arrest or summons is issued on information given the justice, and the summons, if in a penal prosecution, merely commands the officer to summon the accused to appear in court on a day named, to answer the charge of having committed the offense, briefly describing the character of the offense. The offense in this case is peddling without license, and is sufficiently described in the warrant. The object is to get the party accused before the justice when he has violated the law, and when the justice has the jurisdiction no pleading is necessary. In this case the jurisdiction is expressly conferred by the statute, and the justice before whom the party is brought may proceed at once to the investigation of the charge, giving of course the parties before him such time as may be necessary to prepare for trial. (Sections 330, 311, 310, Criminal Code; chapter 84, General Statutes.)

Judgment affirmed.

Judge Lewis not sitting.

Grinstead & Basham for appellant.

W. A. Bullock and P. W. Hardin for appellee. Digitized by Google

ROBINSON v. CITY OF LOUISVILLE.

(Filed December 6, 1881—Not to be reported.)

Policeman dismissed from service by the mayor of the city of Louisville may appeal from the order of dismissal to the board of police commissioners of said city, and if the action of the mayor be not sustained the commissioners may restore such policeman to his place, but without being thus restored he can not recover from the city his regular pay as such policeman.

Appeal from Jefferson Common Pleas Court.

Opinion of the court by Judge Pryor.

The appellant was elected a policeman of the city of Louisville for three years from the 19th of January, 1878, and having been commissioned as required by the city charter proceeded to discharge the duties of a policeman. On the 21st of January, 1879, the mayor of the city issued an order dismissing him from the police force in the following words: "For cause which I deem sufficient you are hereby dismissed from the police force of the city of Louisville." Signed John G. Baxter, and addressed to the appellant. The appellant filed this petition against the city alleging his removal without cause, and seeks to recover the regular pay due him as a member of the police organization, averring that he was at all times in readiness to discharge his duties, and so notified the chief of police, and denying the right of the mayor to remove him without cause. He further alleges that no cause was assigned for his dismissal, and none in fact existed. By section 82 of the city charter the mayor, the president of each board of the general council, and the chairman of the police committee of each board constitute a board of police commissioners, with the power to elect the police force. By section 89 of the charter the mayor is empowered to dismiss any member of the police for intermeddling with, or directly or indirectly taking part in elections further than to vote, for failing to perform any duties imposed on him as a policeman, for neglect of his family, or for any other cause he may deem sufficient.

It is urged in argument of counsel for the city that under this general power of removal the mayor can act without making any specific charges against the accused, and by appellant's counsel that his client is entitled to know the nature of the

complaint made that he may have an opportunity of disproving it. It is not necessary for this court to pass upon this question as the examination of other provisions of the city charter satisfies us that appellant's remedy is by an appeal to the tribunal created by the charter for hearing such complaints, and sent to the courts of the State. Section 89 of the charter provides, among other things, "but any policeman so dismissed may appeal to the board of police commissioners, and if the action of the mayor be not sustained the commissioners may restore such policeman to his place." There is no reason assigned why this appellant could not avail himself of the plain remedy provided by the provisions of the charter under which he was elected, as the commissioners had full and complete power to reinstate him if he had been removed without cause. The court below acted properly in declining to supervise the action of the mayor in his attempt to maintain an effective police force within the city, or to interfere with the terms of the charter that invest those who understand the entire plan of police organization and the rules by which its members are governed with the power to hear the complaint where the act of removal is complained of.

It is asserted, however, that as the dismissal was without cause there is nothing to appeal from. We can not adopt this view of the question, nor hold the order of dismissal void. The power of removal exists, and if without cause the board of commissioners is authorized to take cognizance of the case and reinstate the appellant. The denial of the jurisdiction in the court below only remands the appellant to a tribunal with more facilities for investigating the wrong of which he complains. If reinstated the court will listen to his claim for compensation.


Judgment affirmed.

C. B. Seymour for appellant.

T. L. Burnett for appellee.

MARTIN v. FERGUSON.

(Filed November 29, 1881—Not to be reported.)

1. Conditional promise should be so averred in the petition. The prom-

ise pleaded and relied on being unconditional, the plaintiff was not entitled to a verdict upon proof of a conditional promise." (9 B. Mon., 44; 6 Dana, 248; 7 Johnson's Ch. Rep., 86.)

2. A promise to pay "when able," if pleaded and proven, will not authorize an instruction to the jury to find for the plaintiff in the absence of proof of the defendant's ability to pay.

"If the defendant's promise was to pay when able, his ability to do so is the essence of the promise, and it should be averred and proven."

Appeal from Woodford Circuit Court.

Opinion of the court by Chief Justice Jewis.

The court did not err in permitting the amended petition filed. But the plaintiff in the action having elected to strike from the pleading the statements of the petition which were inconsistent with those contained in the amended petition, the only issue presented for trial was whether the defendant in the action subsequent to his discharge in bankruptcy promised to pay the debt sued on.

The promise alleged to have been made, and which is the foundation of the action, being absolute and unconditional, in order "to maintain his action in the form in which it was brought it was incumbent on the plaintiff to have proved an express and unconditional promise by the defendant to pay the debt." (Egbert v. McMichael, 9 B. M., 44.)

"If the defendant's promise was conditional it should have been averred by the plaintiff in his declaration." (1 Dana, 248; 7 Johnson's Rep., 86.)

It follows, therefore, that so much of the instruction given as directs the jury to find for the plaintiff upon the hypothesis that the promise made was to pay the debt when he (the defendant) was able, is erroneous. Neither the pleading nor evidence authorized the instruction as it was given. The promise pleaded and relied on being unconditional, the plaintiff was not entitled to a verdict upon the proof of a conditional promise. And even if the conditional promise had been both pleaded and proved the instruction should not have been given in the absence of proof of the defendant's ability to pay the debt.

If the defendant's promise was to pay when able, his ability to do so is the essence of the promise, and it should be averred and proven. The jury should be satisfied by facts proven at

the trial that the debtor has property and means which enable him to pay the debt, otherwise no verdict or judgment can be rightfully rendered against him on such conditional promise. Such is the doctrine announced by the court in the cases of *Mason v. Hughart*, 9 B. M., 482, and *Eeler v. Galbraith & Lail*, 12 Bush, 72, and we see no reason why it should not be adhered to.

Wherefore, the judgment of the court below is reversed and the cause remanded, with directions to award to appellant a new trial and for other proceedings consistent with this opinion.

D. L. Thornton for appellant.

Porter & Wallace for appellee.

BRYSON v. OSENTON, &c.

BRYAN v. SAME, &c.

(Filed December 14, 1881—Not to be reported.)

By accepting provision made by her the wife of the testator is not estopped from asserting claim to her own land which was included in the devise of her husband to his sons.

"This is not a case for an election under section 12 of chapter 31. General Statutes, because that provision applies to cases where the testator is undertaking to dispose of his own property and not that of another."

Appeal from Greenup Circuit Court.

Opinion of the court by Judge Hines.

Appellant, Elizabeth Bryson, owned, through the will of her father, one-sixth interest in a certain tract of land, the remaining five-sixths was owned by her husband, William Bryson, by purchase from the heirs of Mrs. Bryson's father. On the death of William Bryson he left a will, in which he made provision for his wife, and devised the tract of land mentioned to his sons without any mention of the sixth interest of Mrs. Bryson. The sons took possession of the land and lived upon it some two or three years and mortgaged it to appellee, Osenton. In a suit to foreclose this mortgage Mrs. Bryson asserts claim to the one-sixth interest, and the question is whether it goes to Mrs. Bryson or to satisfy the mortgage.

It is claimed for appellee that the long silence of Mrs. Bryson and the receipt of benefits under the will amounted to an election to take under the will, and that she is estopped now to assert title to the one-sixth of the land. This is not a case for an election under section 12 of chapter 81 of General Statutes, because that provision applies to cases where the testator is undertaking to dispose of his own property and not that of another. The only estoppel that could be applied here is an equitable estoppel, which exists independent of the statute, and as to such estoppel there is neither plea nor proof. There is no equitable estoppel unless by reliance upon the conduct and silence of Mrs. Bryson appellee has been misled to his prejudice. There is no allegation or proof as to this matter. The allegation may be considered sufficient to raise the question of election under the statute, if this were a proper case for the application of the statute, for in such case the law makes the estoppel. (Bigelow on Estoppel, section 90, page 508.)

For this error the case must be reversed, but as the parties will be entitled to a new trial and additional evidence may be heard we deem it improper to discuss the effect of the will of William Bryson, as these may appear under the new consideration as affecting its construction. On the appeal of Elizabeth Bryson the judgment is reversed and cause remanded, with directions for further proceedings consistent with this opinion, and on the appeal of Bryan judgment affirmed.

L. T. Moore, B. F. Bennett and W. H. Wadsworth for appellant Bryson.

E. C. Phister and A. Duvall for appellants Bryan, &c.

E. B. Wilhoit for appellees.

VANCE v. CAMPBELL, &c.

(Filed December 6, 1881.)

1. Fraudulent conveyance of land may be set aside, and—

Courts of equity have jurisdiction to set aside such conveyances in two instances:

1st. Where the creditor proceeds by attachment upon the grounds specified in subsection 7 of section 194 of the Civil Code; and—

2d. Where the creditor has first reduced his claim to judgment, and return of no property found.

2. The act of 1888 authorizing suit, and conferring jurisdiction upon courts of equity to set aside fraudulent conveyances, "whether the debt be or be not due, or be or not in judgment," has been repealed, by section 1, chapter 44, General Statutes, and sections 194 and 439 of the Civil Code.

But see editorial note under the opinion.

Appeal from Nicholas Circuit Court.

Opinion of the court by Judge Hines.

Appellant having a claim against appellee, Sallie Campbell, for \$375, evidenced by note and holding a lien on a piano to secure its payment, instituted an action in equity in which he alleged the existence of the lien, charged that appellee, Sallie Campbell, had fraudulently disposed of a certain tract of land to R. S. Campbell for the purpose of cheating, hindering and delaying her creditors, and prayed for an attachment. The attachment was issued and levied upon the piano and upon the land, and on hearing the court discharged the attachment and dismissed appellant's petition, but adjudged to him the proceeds of the sale of the piano (\$205), which had been sold under an order of the judge of the county court.

The principal inquiry is, did the court have jurisdiction to set aside for fraud the conveyance made by appellee, Sallie Campbell, to R. S. Campbell before appellant had obtained a judgment at law and a return of no property?

We are of the opinion that the court should have entertained jurisdiction.

There are two instances in which a creditor can go into a court of equity for the purpose of setting aside a fraudulent conveyance and for the purpose of subjecting the property to the payment of his debt. One is where he proceeds by attachment upon the grounds specified in subsection 7 of section 194 of the Civil Code, and the other is where he has first reduced his claim to judgment and had return of no property.

In construing the act of 1888, 3 Statute Laws, 116, which authorized a suit in equity, notwithstanding the claim had not been reduced to judgment, and permitted an attachment, it was held that the power of the court to subject the property did not depend upon the levy of an attachment. (*Milward, &c. v. Cochran*, 7 B. M., 346.) It is now suggested that that

act is still in force, and the same practice is allowable. This, we think, is not correct. Without reference to previous statutes it appears clear that the General Statutes and Civil Code repeal the act of 1838. The first section of chapter 44 of General Statutes is in substance, so far as it defines the fraud, the same as the act of 1838, omitting any reference to jurisdiction or manner of proceeding, while section 194 of the Code provides for proceeding by attachment with bond, and section 439 of the Code provides for proceeding without bond on return of no property. There is legislation upon a subject embraced by the act of 1838 which must be taken to cover the whole field intended to be covered by statutes.

The cases recently decided by this court and relied upon by counsel for appellees were not proceedings by attachment, and, therefore, the question here under consideration was not discussed. The cases of Napper, &c. v. Yager, 79 Ky., —, and Haskell, &c. v. Wynne & Co., MS. opinion, January 11, 1877. The rule there laid down is that in force prior to the act of 1838, and we think it is correctly laid down when the party does not undertake to proceed by attachment under section 194 of the Code, as in this case.

Under the facts of this case appellant's attachment should have been sustained, judgment should have been entered for the amount claimed and the conveyance to R. S. Campbell set aside, and the land subjected to the payment of the debt.

Judgment reversed and cause remanded for further proceedings consistent with this opinion.

Judge Hargis not sitting.

Hargis & Norvell for appellant.

Ross & Lytle for appellees.

Whether the act of 1878 (3 Statute 194 and 439 of the Code of Practice, is Laws, 116), regulating chancery proceedings and providing that "the courts of chancery in this Commonwealth shall have power and jurisdiction in favor of any creditor, whether the debt be or be not due, or be or not in judgment, to set aside the fraudulent sale, conveyance," etc., has been repealed by section 1, chapter 44, General Statutes, and sections 194 and 439 of the Code of Practice, is a question clearly not raised or proper to be considered or decided on the appeals and record under consideration in this case. While we raise no question as to the correctness of the decision of the court on the facts of the case as stated in the paragraph next to the last one in the foregoing opinion, we can not, in justice to the court, or to the pro-

fession, or to ourselves, refrain from expressing our dissent and pointing out what, in our opinion, is clearly erroneous in the dicta in reference to questions stated in the opinion, but not raised in or proper to be decided on the appeal or record under consideration. The material facts of the case are substantially as follows:

Appellee, Sallie Campbell, an infant, rented from appellant, T. C. H. Vance, a piano, and agreed in writing, dated May 17, 1876, that she would pay \$5 on the first day of each month for its use, and that if she purchased it after she became twenty-one years of age she would pay or execute her note for \$375 for it, less such sums as she had paid on the rental contract. Having paid \$5 on the rental contract and become twenty-one years of age, she agreed to purchase the piano, and in pursuance of that agreement executed her note to Vance for \$370, dated April 11, 1877, due one day after date, bearing interest at eight per cent., and secured by a lien on the piano.

Vance filed his petition in equity August 10, 1877, in the circuit court against the appellees, said Sallie Campbell and her uncle, Robert P. Campbell, alleging the execution of the note for \$370; that it was secured by lien on the piano; that the piano had depreciated in value \$170; that defendant, Sallie Campbell, had fraudulently sold and conveyed to the defendant, Robert P. Campbell, thirty-seven acres of land, describing it, for the purpose of hindering, delaying and defrauding her creditors, etc., and prayed "judgment against said Sallie Campbell for \$370; * * * for the subjection of so much of said tract of land * * * as may be necessary to satisfy plaintiff's demand; * * * for a general attachment against the property of defendant, Sallie Campbell; * * * a specific attachment against the said piano;

that it be taken and sold for the payment of his debt, so far as the same is sufficient or that purpose, and for all other proper relief."

The clerk issued a general attachment against the property of Sallie Campbell, on which the following return was made, to wit:

"Executed August 10, 1877, by levying same on one piano and taking same into my possession; also by delivering a true copy of the within order to defendant, Sallie Campbell, and to R. J. R. Tilton, garnishee, and by levying on a certain tract of land, * * * thirty-seven acres, * * * by leaving a copy of this attachment with R. P. Campbell, who has the land in possession."

Sallie Campbell and R. P. Campbell answered. She defended and sought to avoid the payment of the note upon the ground that she had been induced to execute it by the fraud of Vance, etc. They both denied fraud in the sale and conveyance of the thirty-seven acres of land.

The county judge made an order directing the sheriff to sell the piano as perishable property. At the sale Vance became the purchaser thereof for \$205.

On the final trial the court rendered judgment as follows:

"This cause coming on to be heard upon pleadings, exhibits and proof, and the court being advised, it is adjudged that the plaintiff's petition be dismissed and his attachment discharged, and that the defendants recover of the plaintiff their costs herein expended. But it is adjudged that the plaintiff is entitled to the piano, for which the note sued on by plaintiff was given. The plaintiff acquired the possession of the piano since the commencement of this suit by purchase at a sale made of it by a commissioner under an order of the county judge of Nicholas county court in vacation, and made in this

case, which sale is confirmed. The plaintiff is discharged from liability on account of his said purchase of the piano. The taxed attorney's fee herein is endorsed to the use of J. H. Holladay, and the parties are hence dismissed without day. The plaintiff objects and excepts to the foregoing judgment."

It will be observed that his judgment in effect sustains the defense pleaded by Sallie Campbell, and completely exonerates her from liability on the note for \$370 sued on.

To reverse the foregoing judgment the appeal was prosecuted in this case.

The first and main question raised by the appeal was: Did the circuit court err in sustaining Sallie Campbell's defense and exonerating her from liability on the note sued on? An affirmative answer to this question would have resulted in an affirmation of the judgment appealed from, but the court answered this question in the negative, and declared both its answer and its effect in the paragraph of the opinion above referred to, to wit:

"Under the facts of this case appellant's attachments should have been sustained, judgment should have been entered for the amount claimed, and the conveyance to R. S. Campbell set aside, and the land subjected to the payment of the debt."

The above extract would have more logically expressed the decision of the court if it had read as follows: "Under the facts of this case judgment should have been entered for the amount claimed; the attachment should have been sustained; the conveyance to R. S. Campbell set aside, and the land subjected to the payment of the debt."

When the court decided to reverse because the facts did not sustain Sallie Campbell's defense to the note it then became necessary for it to de-

termine whether the court below erred or not in discharging the attachment.

In considering this question on the facts appearing in the record it is manifest from the foregoing extract from the opinion that the court determined, first, that the attachment was properly issued; second, that the conveyance of the thirty-seven acres of land by Sallie Campbell to R. S. Campbell was fraudulent and void as to the plaintiff, Vance, to the extent of the claim sued on.

The court evidently and logically decided upon the facts appearing in the record—

1st. That the defense of Sallie Campbell to the note sued on was not good, or was not sustained, and, therefore, that the court below erred in dismissing the petition, and also in refusing to render judgment for the amount of the claim sued on.

2d. That the conveyance of the thirty-seven acres of land by Sallie Campbell to R. S. Campbell was fraudulent and void as to the plaintiff, Vance, to the extent of the claim sued on, and that said land was subject to the attachment, and, therefore, that the court below erred in discharging the attachment, and also in refusing to set aside the conveyance of the thirty-seven acres of land.

In deciding that the court below should have set aside the conveyance the court necessarily had to decide that that court had jurisdiction to set aside the conveyance, and having decided that the court had such jurisdiction because the plaintiff proceeded "by attachment upon the grounds specified in subsection 7 of section 194 of the Civil Code," all that part of the opinion in relation to the necessity of a return of no property found and the repeal of the statute of 1888 is the merest dicta, and in our opinion erroneous dicta at that.

We concur with the decision that the lower court had jurisdiction, on

the facts appearing in the record, to set aside the conveyance of the land, but we dissent wholly from the grounds or reasons given by the court for its decision. The court decides that the lower court had jurisdiction to set aside the conveyance without a return of no property found because the plaintiff proceeded by attachment upon the grounds specified in subsection 7 of section 194 of the Civil Code.

We contend, and have heretofore demonstrated in our October number, that the jurisdiction of the court, in such cases, does not depend upon an attachment or a return of no property found.

Section 194 and subsection 7 thereof provide that—

"The plaintiff may, at or after the commencement of an action, have an attachment against the property of the defendant, including garnishees, as is provided in section 227, as a security for the satisfaction of such judgment as may be recovered.

1st. In an action for the recovery of money against—

1st. A defendant who * * *

7th. Has sold, conveyed, or otherwise disposed of his property, or suffered or permitted it to be sold with the fraudulent intent to cheat, hinder or delay his creditors."

How an attachment issued under this section of the Code and levied on land alleged to have been fraudulently conveyed could confer jurisdiction upon the court to set aside such conveyance is absolutely incomprehensible. If the court had no jurisdiction to set aside the conveyance on the allegations in the petition at the time the attachment was issued, it is clear that the attachment could not confer such jurisdiction for the plain reason that an attachment never confers jurisdiction over the cause of action, but is always ancillary to jurisdiction already existing.

In *Milward v. Cochran*, 7 B. Mon., 344, an action to set aside a fraudulent conveyance of slaves, the court said:

"The first inquiry is whether a lien attached upon the slaves in favor of the complainants upon the filing of their bill.

"The jurisdiction of a court of equity to grant relief upon the first ground relied upon in the original bill is given by the act of 1838 (3 Stat. Law, 116). The second section of that act vests a court of chancery with power and jurisdiction, upon the application of a creditor, whether his debt be or be not in judgment to set aside a sale or conveyance made for the purpose of hindering and delaying creditors in the collection of their debts and to subject the property to the payment of the debt of the applicant. And in aid of the execution of this power the court is authorized to order an attachment, and to make all other necessary orders for the safety and forthcoming of the property.

"In this case no attachment was sued out, but we are of opinion the power of the court to subject the property did not depend upon the actual levy of the attachment. A lien upon the slaves attached upon the exhibition of the complainant's bill and the service of process. The only object and effect of an attachment and levy would have been to secure more effectually the slaves against removal, and have them forthcoming to abide the decree of the court. The suit was a *lis pendens* and no subsequent sale or after-acquired lien would destroy "or affect the prior lien and right of the complainants."

In *Moore's Adm'r, &c. v. Sheppard*, &c., 1 Met., 101, in reference to an attachment the court says: "This provisional remedy is merely ancil-

lary and incidental to the action in which it is brought."

The object and effect of the attachment, issued upon the ground specified in said section 194, is to attach the property of the defendant "as a security for the satisfaction of such judgment as may be recovered," and not to give jurisdiction to the court. If the court had no jurisdiction on the facts stated in the petition to set aside the conveyance of Sallie Campbell without the attachment, it is very clear that the attachment did not have the effect of conferring such jurisdiction.

It is very clear that the filing of the petition and service of process upon Sallie Campbell and R. S. Campbell created a *lis pendens* lien upon the thirty-seven acres of land as perfect, complete and effective as that created by the attachment.

As, therefore, the plaintiff, Vance, had a perfect, complete and effective lien, created by his petition and process thereon, and wholly independent of the attachment, it must be accepted as a clear demonstration that the attachment and levy thereof on the thirty-seven acres of land was a work of supererogation and accomplished absolutely nothing except to increase unnecessarily the costs of the suit. As the court certainly had jurisdiction over the action and also over the land by virtue of the *lis pendens* lien created by the filing of the petition and the service of process thereon, it is not only illogical, but is absurd to say the court had jurisdiction because the plaintiff proceeded "by attachment upon the grounds specified in subsection 7 of section 194 of the Civil Code."

But now as to the erroneous dicta in the opinion under consideration erroneously declaring—

1st. That the act of 1838 had been repealed by section 1, chapter 44 of

the General Statutes, and subsection 7 of section 194 and section 439 of the Civil Code of 1877, and—

2d. That the old law or English rule of equity practice requiring a creditor to have a judgment and return of no property found before he commenced his action on a legal demand to set aside a fraudulent conveyance and subject the property to the payment of his debt, which was in force before and which was repealed by the act of 1838, has been re-established and is now in force.

In Judge Bishop's opinion in *Bross v. Cundiff*, ante, 5154, and in our article, ante, 197-208, we thought it was so clearly shown and demonstrated that the act of 1838 had not been repealed, and that the old law or rule in force before and repealed by that act had not been re-established, and is not now in force, that we are somewhat amazed at the contrary dicta in the opinion under consideration.

We propose now to make these questions so plain as to leave no excuse for any erroneous decision in reference to them hereafter.

Section 2 of the act of 1796 (1 Statute Laws, 737) declared "every gift, grant, or conveyance of lands, * * * to delay, hinder or defraud creditors of their just and lawful actions, suits, debts, etc., to be clearly and utterly void," etc.

In actions to set aside fraudulent conveyances under this statute of 1796 the courts of chancery adopted the English rule requiring the complainant to have judgment and return of no property found before he commenced his action on a legal demand. The act of 1838 (3 Statute Laws, 116) repealed the English rule above referred to by providing as follows:

"Sec. 2. When any person shall sell, or convey, or otherwise dispose of his, her or their lands, goods, wares, merchandise, choses in action,

or other property, or shall suffer or permit the same to be sold, with the fraudulent intent of cheating and defrauding creditors, or of hindering and delaying them in the collection of their debts, the courts of chancery in this Commonwealth shall have power and jurisdiction in favor of any creditor, whether the debt be or be not due, or be or not in judgment, to set aside the fraudulent sale, conveyance or other disposition, and subject the property to the payment of the debt; and for that purpose to attach the property, and make all necessary or proper orders for the safety and forthcoming of the same."

It is affirmed in the opinion in *Vance v. Campbell* under consideration that section 1, chapter 44 of the General Statutes, and subsection 7 of section 194 and section 439 of the Code of 1877 repealed that part of said section 2 of the act of 1838 which declared that "the courts of chancery in this Commonwealth shall have power and jurisdiction in favor of any creditor, whether the debt be or be not due, or be or not in judgment, to set aside the fraudulent sale, conveyance or other disposition." As the General Statutes and Code took effect at different times it is difficult to see how they could operate together or conjointly in accomplishing the repeal of that part of the act of 1838 above referred to.

It is plain that section 2 of the act of 1838 did not in anywise abridge the rights of that class of creditors to whom the courts granted relief under the provisions of the act of 1796; but, on the contrary, that it abolished and destroyed all distinctions and classifications of creditors made by the courts under that act, and expressly conferred the same rights upon all creditors, and expressly declared that "the courts of chancery of this

Commonwealth shall have power and jurisdiction in favor of any creditor, whether the debt be or be not due, or be or not in judgment to set aside the fraudulent sale, conveyance," etc., thereby expressly repealing the English rule of chancery practice adopted by the courts of this State in proceedings under the act of 1796.

It is also plain that the attachment provided for in section 2 of the act of 1838 was not intended to confer, and did not confer, or give jurisdiction, but was intended expressly to apply, not to land, but alone to movable property, "for the safety and forthcoming of the same." (*Milward v. Cochran*, 7 B. Mon., 346.)

It must be borne in mind, throughout this discussion, that prior to and at the time of the adoption of the Constitution of 1850 the laws of this State consisted of such parts of the common law of England, and such acts and parts of acts of the English Parliament, of the State of Virginia and of this State as were then in force in this State; and that, because of the great number of statutes relating to the same subject—regulating the same rights and also regulating remedies for the enforcement and protection of those rights—the Constitution of 1850 (section 22, article 8) provided as follows:

"Sec. 22. At its first session after the adoption of this Constitution the general assembly shall appoint not more than three persons learned in the law, whose duty it shall be to revise and arrange the statute laws of this Commonwealth, both civil and criminal, so as to have but one law on any one subject; and also three other persons learned in the law, whose duty it shall be to prepare a Code of Practice for the courts, both civil and criminal, in this Commonwealth, by abridging and simplifying the rules of practice and laws in rela-

tion thereto; all of whom shall at as early a day as practicable report the result of their labors to the general assembly for their adoption or modification."

It must also be borne in mind that the Revised Statutes and Code of Practice were prepared and adopted pursuant to the foregoing section of the Constitution, "so as to have but one law on any one subject," and also "by abridging and simplifying the rules of practice and laws in relation thereto."

In the light of the foregoing facts we will now resume the discussion.

Said act of 1838 certainly was not repealed or amended prior to the adoption of the Code of Practice, which took effect August 1, 1851, or prior to the adoption of the Revised Statutes, which took effect July 1, 1852, and, therefore, it is clear, and can not be denied or controverted, that under the law as it existed at the time the Code of 1851 and Revised Statutes took effect any creditor had the right, and the courts of chancery had "power and jurisdiction in favor of any creditor, whether the debt be or be not due, or be or not in judgment, to set aside" a fraudulent conveyance.

This right of any creditor to sue to set aside a fraudulent conveyance and the power and jurisdiction of the courts to enforce that right as they existed at the time the Code of 1851 took effect, whether the plaintiff had a return of no property found or not, was not repealed, but was expressly continued in force by section 4 of that Code, as follows:

"Section 4. The plaintiff may prosecute his action by equitable proceedings in all cases where courts of chancery before the adoption of this Code had jurisdiction: and must so proceed in all cases where such jurisdiction was exclusive."

As the Code of 1851 did not make any provision whatever regulating proceedings in actions to set aside fraudulent conveyances, it is clear that said section 4 continued in force the statute of 1838 regulating the jurisdiction of the courts in such actions.

Subsection 7 of section 242 of the Code of 1851 provided that the plaintiff might have an attachment against the property of the defendant who "has sold, conveyed or otherwise disposed of his property, or suffered or permitted it to be sold, with the fraudulent intent to cheat, hinder or delay his creditors."

It is clear that no part of the act of 1838 was repealed by this subsection 7, because it was taken wholly from that act and continued in force precisely the same provision for an attachment that was therein provided for, in aid of and ancillary to the jurisdiction conferred upon the courts in favor of any creditor by that act.

It is, therefore, very clear that as said section 4 continued in force that part of section 2 of the act of 1838, which regulated the jurisdiction of the courts in favor of any creditor, so also said subsection 7 of section 242 continued in force that part of said section 2 which authorized the courts to issue attachments against the property alleged to have been fraudulently sold, "for the safety and forthcoming of the same."

Said section 2 of the act of 1838 consisted of three separate and distinct elements or parts:

1st. That part which declared the fraudulent sale or conveyance void, and thereby declared the right of any creditor to sue to set aside such sale or conveyance.

2d. That part which conferred power and jurisdiction upon the courts "in favor of any creditor, whether the debt be or be not due, or

be or not in judgment," to set aside such sale or conveyance.

3d. That part which authorized an attachment in aid of or ancillary to the jurisdiction conferred upon the courts.

The Code of 1851 continued in force, as above shown, the second and third parts of said section 2, as above set forth—the first part thereof was continued in force by section 1, chapter 40 of the Revised Statutes of 1852, providing as follows:

"Sec. 1. That every gift, conveyance, assignment or transfer of, or charge upon, any estate, real or personal, or right or thing in action, or any rent or profit thereof, made with the intent to delay, hinder or defraud creditors, purchasers, or other persons, and every bond or other evidence of debt given, suit commenced, decree or judgment suffered with like intent, shall be void as against such creditors, purchasers and other persons."

Said section 1, chapter 40 of the Revised Statutes of 1852, and said section 4 and subsection 7 of section 242 of the Code of Practice of 1851, declared and continued in force all the law as it existed at the time said Code and Revised Statutes took effect in reference to fraudulent sales and conveyances, without making any change whatever with reference to the rights of any creditor, or the jurisdiction of the courts as they existed at the time the Code and Revised Statutes took effect, and, therefore, it results, as a matter of fact and inexorable logic, that the courts of equity under the Code of 1851 and Revised Statutes of 1852 had precisely the same jurisdiction which the courts of chancery had before and at the time said Code and Revised Statutes took effect "in favor of any creditor, whether the debt be or be not due, or be or not in judgment to

set aside the fraudulent sale, conveyance or other disposition, and to subject the property to the payment of the debt."

The question now arises: Have the provisions of the Code of 1851, or Revised Statutes of 1852, as above set forth, been repealed or modified by the Code of 1854 or the Code of 1877 or the General Statutes of 1873?

Section 4 of the Code of 1851 was copied and continued in force as section 4 of the Code of 1854, and substantially copied and continued in force again in section 6 of the Code of 1877.

Subsection 7 of the Code of 1851 is identically the same in section 231 of the Code of 1854 and section 194 of the Code of 1877, and, therefore, as said subsection 7 of section 242 of the Code of 1851 did not repeal any part of section 2 of the act of 1838, as is above demonstrated, it must be accepted as a demonstrated fact that the same subsection, identically, in section 194 of the Code of 1877 did not repeal any part of said section 2 of said act of 1838.

Section 1, chapter 40 of the Revised Statutes is identically the same as section 1, article 1, chapter 44 of the General Statutes, and, therefore, as said section 1 of chapter 40 of the Revised Statutes did not repeal any part of section 2 of the act of 1838, as is above demonstrated, it must be accepted as a demonstrated fact that said section 1 of chapter 44 of the General Statutes did not repeal any part of said section 2 of said act of 1838.

The omission of the words "in favor of any creditor, whether the debt be or be not due, or be or not in judgment" from said section 1 of chapter 40 of the Revised Statutes, and from the same section in chapter 44 of the General Statutes, has no significance whatever, because those

words were only used in section 2 of the act of 1838 for the purpose of repealing the old law or English rule of chancery practice which had been adopted by the courts in proceedings under the act of 1796. It is plain that as the old law or English rule of chancery practice was repealed by the use of said words in section 2 of the act of 1838, it was not necessary to transfer to, or use said words in said section 1 of chapter 40 of the Revised Statutes, or in said section 1, chapter 44 of the General Statutes, as they could not have accomplished anything by being so transferred. It certainly was not necessary to use said words in said section 1 of the Revised or General Statutes for the purpose of repealing the old law or English rule of chancery practice, as that same old law or rule of practice was repealed fourteen years before the Revised Statutes took effect, and thirty-five years before the General Statutes took effect. As said words had no office to perform, as it was not necessary to use them again to repeal the old law or rule of chancery practice which had been repealed by them many years before that time, and as they could not have any possible effect by being transferred to and copied in section 1, chapter 40, Revised Statutes, or section 1, article 1, chapter 44, General Statutes, they were properly omitted from said sections.

The word "creditors," as used in section 1, chapter 40, Revised Statutes, and section 1, article 1, chapter 44, General Statutes, wherein said sections declare that every sale, gift, conveyance, etc., "made with the intent to delay, hinder or defraud creditors, * * * shall be void as to such creditors," according to any and every rule of construction that can be applied to it, is as comprehensive as, and embraces every creditor that was embraced by, the words "any creditor, whether the debt be or be

not due, or be or not in judgment," as used in section 2 of the act of 1838.

As any creditor, without classification or distinction, had the right and the courts had power and jurisdiction to set aside a fraudulent conveyance, without having a judgment or return of no property found, at the time the Revised Statutes took effect, it is absolutely certain that if the revisors who prepared and reported, and the legislators who adopted, section 1, chapter 40, Revised Statutes, had intended to repeal the words in section 2 of the act of 1838, which repealed the old law or English rule of chancery practice, and to revive and re-establish that old law or rule of chancery practice which had been repealed by said act of 1838, they would most certainly have used or employed such words as would have been necessary to express that intention. Having no such intention, by using the word "creditors" as they did in said section 1, the revisors and legislators continued the law, as it existed from 1838 up to that time, in force, without change or modification, either as to the right of any creditor or as to the power and jurisdiction of the courts.

But some one unversed in logic or the rules of judicial interpretation may say or suppose that the omission of the words "in favor of any creditor, whether the debt be or be not due, or be or not in judgment," as used in the act of 1838, from section 1, chapter 40 of the Revised Statutes, and section 1, chapter 44 of the General Statutes, and from the Codes of Practice, indicates an intent, by such omission, to repeal said words and also an intent to revive the old law or English rule of chancery practice which was repealed by said omitted words as used in said act of 1838. For the satisfaction of such a reader of this note, if there should be any, we will suggest that the revisors and

legislators who reported and passed said section 1, chapter 40 of the Revised Statutes well know that the old law or rule of chancery practice which was repealed by said omitted words would not be revived or re-established again by the omission, or by the repeal of said omitted words, as they had expressly provided in chapter 21 of the Revised Statutes, as follows:

"Sec. 23. When a law which may have repealed another shall be repealed the previous law shall not be revived unless the law repealing it be passed during the same session."

The Code of 1851 provided as follows:

"Sec. 740. All statutes and laws heretofore in force in this State, in any case provided for by this Code or inconsistent with its provisions, are hereby repealed and abrogated; but this repeal does not revive any statute or law which may have been repealed or abolished by the statutes or laws hereby repealed." * * * (Section 875, Code of 1854; section 839, Code of 1877; section 22, chapter 21, General Statutes.)

Section 2 of the act to adopt the Revised Statutes provides as follows:

"Sec. 2. That all statutes of a general nature, whether of this State, of Virginia, or of England, adopted prior to the first day of November, 1851, other than the Revised Statutes adopted at the last session of the general assembly, shall stand repealed when the Revised Statutes take effect, except as follows."

Among the exceptions is the following:

"Sec. 5. The statutes regulating proceedings in civil, criminal and penal cases, not repealed by the Code of Practice or the Revised Statutes."

As section 2 of the act of 1838 regulated proceedings in one class of civil

cases was not repealed by the Code of 1851, but was expressly continued in force by section 4 of that Code, as is above clearly shown, it is certainly excepted from the effect of said repealing clause of the act adopting the Revised Statutes.

We have not thus far made any allusion to section 439 of the Code of 1877 to which reference is made in the opinion in the principal case under consideration. It is, with some immaterial verbal changes, the same as section 474 of the Code of 1854, and reads as follows:

"Sec. 439. After an execution of fieri facias, directed to the county in which the judgment was rendered, or to the county of the defendant's residence, is returned by the proper officer, either as to the whole or part thereof, in substance, no property found to satisfy the same, the plaintiff in the execution may institute an equitable action for the discovery of any money, chose in action, equitable or legal interest, and all other property to which the defendant is entitled, and for subjecting the same to the satisfaction of the judgment; and in such actions persons indebted to the defendant, or holding money or property in which he has an interest, or holding evidences or securities for the same, may be also made defendants."

It is plain, as shown in our article (ante, 197-208), that this section has not the slightest reference whatever to an action to set aside a fraudulent conveyance, and does not confer jurisdiction or regulate the proceedings in such an action.

The statute declares a fraudulent sale or conveyance void as to "creditors, purchasers and other persons," but under the statute such a sale or conveyance is valid as to the vendor or grantor. The vendor or grantor, in such a sale or conveyance, has no

interest in the property sold or conveyed, which he can alienate to a party having notice of such sale or conveyance, or to which he can assert any claim in a court of law or equity, or which would descend to his heirs at his death. It is, therefore, clear as said section 439 provides for and regulates proceedings on a bill of discovery filed, after a return of no property found, to discover and subject property and interests "to which the defendant is entitled" it has no reference or relation whatever to an action to set aside a fraudulent sale or conveyance of property in which, after making such fraudulent sale or conveyance, the defendant, vendor or grantor, certainly has no right, title or interest whatever.

All the provisions of said section 439 were in force at the time and long before the act of 1838 was passed. (Act of 1821, 1 Statute Laws, 302; Act of 1828, 1 Statute Laws, 305-307.)

Said act of 1821 provides as follows:

"Sec. 6. Whenever an execution of fieri facias, founded upon any judgment or decree, or upon any bond having the force of a judgment, shall issue to the proper officer and be returned, as to the whole, or any part thereof, in substance, that the defendant hath no effects in his bailwick to satisfy the same, the proper court or courts of chancery shall have jurisdiction, on a bill filed, to subject to the satisfaction of such judgment, decree or bond, any choses in action belonging to the debtor, and also any equitable or legal interest in any estate, real, personal or mixed, which the debtor may be entitled to; and to that end, may bring other parties before the court, and make such decree as may be equitable under the jurisdiction hereby conferred: Provided, That nothing in this act contained shall be construed to extend to those articles in possession of a defendant which are exempted by law from execution."

It is very clear that the above statute of 1821, as amended by the statute of 1828 (1 Statute Laws, 305-307), embraced and provided for every case or contingency that is embraced or provided for by said section 439 of the Code.

Section 474 of the Code of 1854 and section 489 of the Code of 1877 simply continued in force said statute of 1821, regulating proceedings, by bill of discovery, on a judgment and return of no property found, to discover and subject property and interests to which the defendant was entitled.

If any reader of this note will examine said statutes of 1796 and 1838 declaring fraudulent sales and conveyances void and regulating proceedings to set aside such sales and conveyances, and also examine said statutes of 1821 and 1828 regulating proceedings by bills of discovery on a judgment and return of no property found, he will see and be convinced beyond a doubt that said statutes of 1821 and 1828 had no possible reference whatever to proceedings to set aside fraudulent sales and conveyances which were alone provided for and regulated by said statutes of 1796 and 1838. It results, therefore, that as said statute of 1821 had no reference whatever to proceedings to set aside fraudulent sales or conveyances made in violation of said statutes of 1796 and 1838, it must be accepted as a demonstrated fact that said section 439 of the Code continuing in force the provisions of said statute of 1821 has no reference whatever to proceedings to set aside fraudulent sales or conveyances made in violation of the provisions of section 1, article 1, chapter 44 of the General Statutes, continuing in force the provisions of said statutes of 1796 and 1838, which were in force at the time the Code of 1851 and Revised Statutes of 1854 took effect. And as said statute of 1821 did not and could not repeal said

statute of 1838, passed seventeen years after said statute of 1821 was passed, it must also be accepted as a demonstrated fact that said section 489 of the Code, continuing in force said statute of 1821, did not and could not repeal any part of said statute of 1838. To say or decide that the statute of 1838 was repealed by section 439 of the Code is simply to say or decide that the statute of 1838 was repealed by the statute of 1821.

If we deemed it necessary to demonstrate by authority of decisions of the Court of Appeals of this State that that part of section 2 of the act of 1838 which declares that "the courts of chancery of this Commonwealth shall have power and jurisdiction, in favor of any creditor, whether the debt be or be not due, or be or not in judgment, to set aside the fraudulent sale, conveyance or other disposition, and subject the property to the payment of the debt," was not repealed by the Code or Revised Statutes, or by the Code and the Revised or General Statutes, we have the decisions at hand amply sufficient to enable us to do so.

In *Parsons v. Meyburg, &c.*, 1 Duvall, 206. Judge Robertson delivered the opinion as follows:

"It seems to this court that the provisions of the Code regulating proceedings and attachments on bills for discovery and subjection of property after a return of 'no property' on an execution, do not apply to a petition in equity for the subjection of an equity known and described, or for enforcing an equitable lien. Any such proceeding in rem operates as a lien without a formal attachment. And consequently the pre-existing law authorizing and regulating such proceedings is not inconsistent with the modern law regulating attach-

ments. Nor is it repealed or modified by the 875th section of the Code." (*Davis v. Sharron*, 15 B. Mon., 69; *Overfield v. Sutton*, 1 Met., 621; *Allen v. Ramsey*, 1 Met., 114; *Lee v. Forman*, 3 Met., 114; *Johnson v. Offutt*, 4 Met., 119; *Smith v. B. & N. I. Co.*, 11 Bush, 390.)

It is a singular fact developed in the investigation of the questions under consideration that the decision above referred to, in *Milward v. Cochran*, 7 B. Mon., 344, delivered in 1847 in a proceeding under the statute of 1838, was adhered to, respected and observed in all the courts of this State for more than thirty years, and until the Court of Appeals was constituted of judges who came to the bar after the Code of 1851 and Revised Statutes of 1852 took effect. In view of this fact it is easily perceived how such judges could have no knowledge whatever of the statute of 1838 as they never used the book in practice in which that statute was printed. The reports also contained many cases decided under the provisions of the statute of 1796 holding that a return of no property was necessary, and but one opinion under the statute of 1838. In view of this fact it is also easily perceived how such judges, after such a great length of time, should be misled by the more numerous and older decisions in proceedings under the statute of 1796.

Whether or not the statute of 1838 was continued in force or repealed by the Code or Revised Statutes, or by the Code and Revised or General Statutes, and whether or not the old law or English rule of chancery practice, which was adopted by the courts of this State in proceedings under the statute of 1796, and repealed by the statute of 1838, was revived or re-established by the Code or Revised

Statutes, or by the Code and Revised on a legal demand, to set aside a fraudulent sale or conveyance. Under the supposition that the decisions which were never raised in and decided by the Court of Appeals until under the statute of 1796 were still in that court was composed of judges force, and evidently without any who evidently had no knowledge knowledge of the existence of the whatever of the statute of 1838 or of statute of 1838, or of the fact that the fact that the old law or English said statute had repealed the old law rule of chancery practice was repealed or English rule of chancery practice. by that statute. which had been adopted by the courts

In each of the opinions, except the in proceedings under said statute of one delivered December 6, 1881, now 1796, or of the further fact that such under consideration, recently delivered by the Court of Appeals, intimating or deciding that the plaintiff decisions had been rendered obsolete must have a judgment and return of by such repeal, the court say: In *Haskell v. Wynne*, MS. opinion, delivered January 11, 1877 (*ante*, 54), as follows:

"Prior to the adoption of the Code of Practice it was repeatedly held by this court that when there was no obstruction to the recovery of a judgment at law a creditor could not maintain a suit in equity to set aside a fraudulent conveyance of the debtor's property until he had obtained a judgment and return, *nulla bona*. (*Gilpin v. Davis*, 2 Bibb, 416; *Allen v. Camp*, 1 Mon., 282; *Wycliffe v. Lyon*, 5 J. J. Mar., 87; *Poague v. Boyce*, 6 Ib., 83; *Moffat v. Ingham*, 7 Dana, 496; *Halbert v. Grant*, 4 Mon., 581.) And in *McKinley v. Combs*, 1 Mon., 166, it was held that a creditor having a judgment and return of *nulla bona* on one demand could not unite with it, in a suit to set aside a fraudulent conveyance, another demand on which no judgment had been obtained.

After setting aside fraudulent sales and conveyances, in actions by creditors who had no judgment or return of no property found, and who did not proceed by attachment, for many years, as in—

Todd v. Hartley, 2 Met., 206, in 1859.

Hurd v. Courtenay, 4 Met., 140, in 1863.

Lowry v. Fisher, 2 Bush, 70, in 1867.

Dohoney v. Dohoney, 7 Bush, 217, in 1870.

Farmer's Bank v. Long, 7 Bush, 338, in 1870, and many other cases, the Court of Appeals, by some unaccountable fatuity, had its attention drawn to the old line of decisions in proceedings under the statute of 1796, deciding that a creditor must have a judgment and return of no property found before he commenced his action,

"At that time, and up to the adoption of the Code, a court of equity had no jurisdiction to render judgment upon a legal demand unless there was some impediment upon it at law, and the rule that a return of *nulla bona* must precede a suit in equity to subject property fraudulently conveyed by the debtor, was based upon the ground that until such a return was made it did not

appear that the ordinary legal remedies would not prove effectual. In other words, that the chancellor would not aid a party until it appeared that he was without adequate remedy at law, and that as respected the inability of the creditor to obtain satisfaction of his legal demand by legal proceedings and process the only evidence deemed sufficient was a return of nulla bona."

Every line of the foregoing extract from the opinion in *Haskell v. Wynne* shows conclusively that the author of that opinion, at the time he prepared it, had no knowledge whatever that the statute of 1838 had ever existed, or that the rule stated by him had been expressly repealed by that statute, or that the cases cited by him had become absolutely obsolete by reason of that repeal.

In *Napper v. Yager*, opinion delivered February 15, 1881 (*ante*, 49), in passing upon questions raised in an action to set aside a fraudulent conveyance, without any discussion whatever, the court say: "Such suits can not be maintained without judgment and return of nulla bona." (*Moffat v. Ingham*, 7 Dana, 495; *Halbert v. Grant*, 4 Mon., 581; *Payne v. Poague*, 6 J. J. Mar., 83.)

"In *Haskell v. Wynne*, MSS. opinion, cited in section 130, *Barbour's Digest*, title *Fraudulent Conveyances*, one of several plaintiffs in consolidated suits had a return of no property."

It is so clearly manifested that both of the opinions just referred to were prepared and delivered by oversight or mistake, and without any knowledge of the fact that the rule there stated, "that a return of nulla bona must precede a suit in equity to subject property fraudulently conveyed by a debtor," had been repealed by the statute of 1838, that any further

comment is unnecessary to demonstrate that patent fact.

Referring to *Napper v. Yager* and *Haskell v. Wynne*, the opinion in the principal case under consideration says: "The rule there laid down is that in force prior to the act of 1838, and we think it is correctly laid down when the party does not undertake to proceed by attachment under section 194 of the Code, as in this case."

If in the extract just quoted the court intended to say, or affirm, that the rule there referred to, as being correctly laid down and in force prior to the act of 1838 was still, or is now, in force in such proceedings, "when the party does not undertake to proceed by attachment under section 194 of the Code," it was certainly incumbent upon the court, after seeing that that rule was repealed by the act of 1838, to show, when, how, or by what that same rule was revived or re-established. The court did not and could not show when, how or by what that rule was revived or re-established because it never was revived or re-established by any statute. Having been repealed by the act of 1838, that rule could only be revived or re-established by statute. The Court of Appeals has no power or jurisdiction to make laws, or to revive or re-establish rules of practice which had been repealed by statute, and it certainly had no power to revive or re-establish the rule of practice which was repealed by the act of 1838, or to take from courts of equity the power and jurisdiction which was expressly conferred by that act. The act of 1838 certainly contained, identically, every provision that is now contained in the General Statutes and Code, which can possibly have any relation whatever, specially to an action to set aside a fraudulent

sale or conveyance, and, therefore, it is now plain that no change has been made by the General Statutes and Code in the law in reference to such proceedings; and it is also plain that the law is now precisely that it was before the adoption of the Code and Revised Statutes, unless a new law has been made by the Court of Appeals in the erroneous decisions above referred to, founded upon a clear mistake or oversight, as to the fact that must now be admitted by all, that the rule referred to was actually repealed by the act of 1838, and has never been revived or re-established by any statute since that act was passed.

But the opinion under consideration affirms that a creditor now has no right, and that a court of equity now has no jurisdiction, to set aside a fraudulent sale or conveyance unless such creditor has a judgment and return of no property found before he commences his action; or unless such creditor proceeds by attachment under section 194 of the Code.

We have above shown conclusively that the rule requiring the creditor to have a judgment and return of no property found was repealed by the statute of 1838; that the statute of 1838 has not been changed by the General Statutes and Code; that under the statute of 1838 jurisdiction, and a lien upon the property sought to be subjected, was created by the petition and process thereon; and also that jurisdiction was not created by and did not depend upon an attachment levied upon the property sought to be subjected. (*Milward v. Cochran*, 7 B. Mon., 344.)

But it clearly results from the opinion under consideration that the petition of the plaintiff, Vance,

against the defendants, Sallie Campbell and R. P. Campbell, did not confer jurisdiction upon the court to set aside the fraudulent conveyance made by Sallie Campbell to R. P. Campbell, and that such jurisdiction is conferred by the issuance and levy of the attachment on the thirty-seven acres of land. If R. P. Campbell had demurred to the petition for want of jurisdiction, his demurrer ought to have been sustained, according to the opinion under consideration, if no attachment had been issued, but it ought to have been overruled because the attachment was issued and levied on the thirty-seven acres of land. If the petition and summons did not confer jurisdiction upon the court, in this case, to set aside the sale and conveyance of the thirty seven acres of land, it is very clear that the attachment did not cure the defects in the petition. If the court had no jurisdiction without the attachment, it clearly had none with the attachment.

To say or to decide that the court did not have jurisdiction on the facts averred in the petition, and service of the summons issued thereon, to set aside the sale and conveyance of the land to R. P. Campbell, and that the court did have such jurisdiction on that same petition and summons because the attachment was issued and levied on the land, would simply be the climax of judicial absurdity, as in determining the fact whether the court had jurisdiction or not, or whether the facts averred in the petition were sufficient to give or confer jurisdiction upon the court, the court would have no right to look at or give any consideration whatever to the attachment, or the levy endorsed on it.

W. P. D. BUSH.

ABSTRACTS OF KENTUCKY DECISIONS.

McGUIRE, &c. v. THOMAS, &c.

Filed October 29, 1881—Not to be reported.

Appeal from Lee Circuit Court.

Opinion of the court by Chief Justice Lewis, reversing.

Sureties in bond of deputy sheriff are not liable for failures of duty except during the term of the sheriff.

H. C. Lilly for appellants.

John L. Scott for appellees.

MONTEREY & NEW COLUMBUS TURNPIKE CO. v. DAVIS.

Filed November 17, 1881—Not to be reported.

Appeal from Owen Circuit Court.

Opinion of the court by Chief Justice Lewis.

1. No appeal can be taken from the judgment of a justice of the peace or police judge to the quarterly court where the matter in controversy is of the value of ten dollars or more.

The appeal must be taken to the circuit court in such cases. Act of general assembly, approved March 20, 1876, section 4.

2. The opinion shows the distinction between this case and the case of Hughes v. Hardesty, 13 Bush, —.

Hallam & Gordon for appellant.

T. D. Theobald for appellee.

McKINNEY, &c. v. COMMONWEALTH.

Filed November 26, 1881—Not to be reported.

Appeal from Jackson Circuit Court.

Opinion of the court by Judge Hines, reversing.

1. Sureties on a recognizance are entitled to a jury to try whether there was a delivery by them of the person bailed into the custody of the jailer.

2. "A delivery to the jailer so as to exonerate the bail must be such as to give the jailer dominion over the accused, and this can ordinarily be done only by putting the accused in the apartment of the jail where prisoners are usually confined."

John L. Scott for appellants.

P. W. Hardin for appellee.

TAYLOR, &c. v. McMILLION'S ADM'R.

Filed November 29, 1881—Not to be reported.

Appeal from Monroe Circuit Court.

Opinion of the court by Judge Pryor, affirming.

Vendor's lien was not waived by taking other security, in this case, for the purpose of rendering the payment of his debt more certain.

W. A. Bullock and J. M. Busham for appellants.

V. H. Grinstead and P. H. Leslie for appellee.

COMMONWEALTH v. BRENTS.

Filed December 1, 1881—Not to be reported.

Appeal from Clinton Circuit Court.

Opinion of the court by Judge Pryor, affirming.

A bail bond, required to be given by an examining court, can not be forfeited in the circuit court, where no bond or any minute from the examining court, showing that such a bond was executed, has been filed in the circuit court.

P. W. Hardin and S. M. Payton for appellant.

Sandidge & Craddock for appellee.

GLAZE BROOK & BRO. v. BRANDON.

Filed December 1, 1881—Not to be reported.

Appeal from Monroe Circuit Court.

Opinion of the court by Judge Pryor, affirming.

1. Execution levy on land creates a lien on the land which is exhausted by the sale.

The levy does not create a lien on the owner's equity of redemption.

A second levy is necessary to create a lien on the owner's equity of redemption.

2. The first levy on the equity of redemption and sale thereunder vests the purchaser with the right to redeem.

John W. Compton and Lewis McQuown for appellants.

W. S. Maxey for appellee.

ELLIOTT'S ADM'R v. BUSH, &c.

Filed December 1, 1881—Not to be reported.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Pryor, reversing.

Purchaser of land at decretal sale is not entitled to rents accruing between date of sale and date of confirmation of report of sale.

In this case the land was sold in an administrator's suit to pay debts of a decedent. During the progress of the suit the administrator, who was also guardian for the infant children, rented out the real estate. The lower court adjudged that the purchasers were entitled to the rents which accrued from the date of the sale to the date of the confirmation of the sale. That judgment is reversed.

Wilson & Hobson for appellant.

S. H. Bush for appellees.

The decision in this case will be a surprise to many of the most accurate and best equity practitioners in the State, as we personally know that many of them have considered it as virtually settled that the purchaser of real estate, under rent at the time, at a decretal sale is equitably entitled to all

the rents accruing thereon from the date of the sale to the date of the confirmation thereof.

Whatever may be the rule of practice in England and in many of the American States, it is well settled in this State that the confirmation of a decretal sale of real estate relates back to the date of the sale, and vests the purchaser with the title as of that date, and imposes upon him all the incidental burdens of actual ownership of the property from the date of his purchase. If taxes and assessments are levied upon the property after his purchase and before confirmation of the sale he is bound to pay them, and is not entitled to any credit on his purchase bonds for such payments. If the property is damaged or destroyed by fire, or flood, or otherwise, after his purchase and before the confirmation of the sale, he must bear the loss, and is not entitled to a credit on his purchase bonds, or to object to the confirmation on account of such loss or destruction of the property. (Section 7, article 1, chapter 92, General Statutes; *Vance v. Foster*, 9 Bush, 391; *Walters, &c. v. Blevins. Ex'or*, 3 Ky. Law Rep., 386.)

If a tenant or trespasser in possession, at or after the sale and before confirmation, should injure or destroy the property or buildings occupied by him, under circumstances in which he would be personally liable in an action for damages, the rule announced in the decision under consideration would make such tenant or trespasser liable to the mortgagor or vendee for the rent or the value of the use and occupation, whilst he would be liable to the purchaser in damages for the injury done to the property whilst he so occupied it.

It certainly can not be a true or just rule of equity which would lead to such a singular result in such a case as would give one person the rent or value of the use and another person damages for the injury.

It certainly can not be contended that the purchaser who sustains the loss resulting from the injury done to the property by the tenant or trespasser in possession would not have a right of action against such tenant or trespasser for damages done to the property at any time after the date of his purchase.

Equity is equal justice—it must necessarily always be consistent with justice and right and with itself—when it imposes all the burdens of actual ownership upon the purchaser of real estate from the date of his purchase. It must under the same circumstances confer all the benefits of ownership upon such a purchaser, otherwise it would not give equal justice, or be consistent with justice and right or with itself.

If real estate is under rental at the time it is sold and the relation of landlord and tenant exists between the occupant and any party to the suit at or from that time to the date of the confirmation of the sale, the confirmation of the sale which imposes all the burdens of ownership upon the purchaser from and after the date of his purchase, must necessarily and inevitably raise the relation of landlord and tenant between such occupant and the purchaser, and carry that relation back to the date of the purchase and confer upon such purchaser all the rights growing out of or appertaining to that relation from and after the date of his purchase.

As equity after confirmation treats the purchaser as the actual owner of the property from and after the date of his purchase, it must necessarily treat him as having been the landlord of the occupants or renters of the

property from and after the date of his purchase, and confer upon him all the equitable rights of such equitable landlord, and entitle him to the rents from and after the date of his purchase.

In enforcing liens or mortgages where the land is in possession of the mortgagor or vendee the relation of landlord and tenant does not exist between the party in possession and any party to the suit, and consequently in such cases the purchaser does not become the equitable landlord of the occupant for the plain reason that the occupant was not a tenant or renter under any party to the suit.

Public policy is best subserved by the establishment of such equitable rules of practice in relation to decretal sales of real estate as will enable the courts to make such sales at full and fair prices.

In all such sales the purchaser is required to pay or execute bonds bearing interest from the date of the sale. If he knows beforehand that he will be required to pay interest on his bid from the date of his purchase, and also knows that he may be deprived of the rents until the sale is confirmed, and also knows that the confirmation may be postponed indefinitely by parties entitled to receive such rents up to date of confirmation, and also knows that if the property is injured or destroyed after the date of his purchase he must bear the loss, he will certainly, in many cases, be deterred from bidding the full value of the property or bidding at all.

The right to retain such rents or to withhold them from the purchaser if once established, as the decision in this case seems to establish, it will result most mischievously and militate against good morals and a sound public policy, as in every such case such rents will be a standing bribe and temptation to parties to commit perjury and frauds in manufacturing objections to the confirmation of the sale. In many cases the amount of the accruing rents would offer a large price for frauds and perjuries in such attempts to prevent or secure a postponement of confirmation.

Decretal sales should not be subjected to such hazards—public policy forbids it—good morals forbid it—equity forbids it.

It seems to us that reason and justice and the equitable rights of purchasers at decretal sales of land require the establishment of the following rules:

1st. Where land is decreed to be sold to enforce a mortgage or vendor's lien, and the mortgagor or vendee is in possession at the time of the sale, the purchaser should have no claim against such mortgagor or vendee for rent or for the value of the use of the property from the date of the sale up to the date of the confirmation.

But if the confirmation should be postponed at the instance or because of exceptions filed by such mortgagor or vendee, he should be made to pay the reasonable value of the use of the property from the date of the motion to confirm the sale to the date of the confirmation of the sale.

2d. Where such land is under rent or in possession of a tenant or persons liable to pay rent or for use and occupation to some party to the suit, at or after the date of the sale, the purchaser should be entitled to the rents accruing, or the value of the use of the property from or after the date of the sale up to the confirmation of the sale.

As this is a very important question and the amount of money involved in the decision under consideration is very small, we take the liberty and do most respectfully suggest to the court and to the painstaking judge who

rendered the opinion that the importance of the question entitles it to a re-argument and the most careful reconsideration of the court.

But as militating somewhat against our contention herein, see *Castleman v. Bibb*, 2 B. Mon., 160; *Taliaferro v. Gay*, 78 Ky., 496, and *Brown v. Berkley*, abstract in this issue next after this note. W. P. D. BUSH.

BROWN v. BERKLEY.

Filed December 3, 1881—Not to be reported.

Appeal from Jessamine Circuit Court.

Opinion of the court by Chief Justice Lewis, affirming.

Purchaser of real estate at decretal sale is not entitled to recover rents from date of sale to the confirmation and conveyance by the court against the defendant in possession. (*Castleman v. Bibb*, 2 B. Mon., 160; *Taliaferro v. Gay*, 78 Ky., 496.)

Geo. R. Pryor for appellant.

J. S. Bronaugh and Ben P. Campbell for appellee.

GREER v. SPENCER.

Filed December 3, 1881—Not to be reported.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Hargis, reversing.

1. Appeals from city courts must be taken within sixty days from the rendering of the judgment.

The time for taking the appeal embraces the day on which the judgment is rendered.

2. Appeal properly taken in this case—

"The appellant filed a transcript, executed an appeal bond, the clerk issued a supersedeas to the city court and a summons to the county in which the judgment was rendered. This is all the law requires the appellant or clerk to do in order to take the appeal."

3. "The fact that the appellee lived in another county than the one to which the summons was issued could not destroy the appeal, as the summons might have been lawfully executed had appellee remained or come into the county, and besides this, if the appellee had not entered his appearance to dismiss the appeal it could never have been lawfully tried without a summons having been served on him."

B. J. Peters and Tyler & Hazelrigg for appellant.

J. J. Cornelison for appellee.

LOUISVILLE & NASHVILLE R. R. CO. v. WILSON.

Filed December 3, 1881—Not to be reported.

Appeal from Rockcastle Circuit Court.

Opinion of the court by Judge Hargis, affirming.

1. The instruction to add interest to the sum of the damages and include both in the verdict was not prejudicial in this case nor cause for reversal, the evidence conducing to show greater damages than were given by the jury, even adding the interest.

2. Demurrer overruled because of failure to withdraw answer curing defect. "As appellant failed to withdraw its answer before filing or causing the demurrer to be heard the court did not err in overruling it, because the answer cured the alleged defect in the petition."

S. M. Burdett and Lyttleton Cooke for appellant.

QUEEN v. PHILLIPS.

Filed December 3, 1881—Not to be reported.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Pryor, reversing.

1. Execution sale does not pass homestead for the reason that the sheriff has no power to sell it.

2. But if the sheriff sells the homestead and makes a conveyance to the purchaser, and the latter in an action in the nature of ejectment recovers the possession, the question then arises, whether this defense to the recovery of the possession is a bar to the recovery of the homestead? This question is not decided because not raised in the record.

E. E. McKay for appellant.

Muir & Wickliffe for appellee.

HUNTER, &c. v. WATTS.

Filed December 6, 1881—Not to be reported.

Appeal from Jessamine Circuit Court.

Opinion of the court by Chief Justice Lewis, affirming.

Note of married woman, secured by lien on land purchased by and conveyed to her—Such lien may be enforced, although a personal judgment can not be rendered against her on such note.

Breckinridge & Shelby and H. A. Anderson for appellants.

J. S. Bronaugh for appellee.

HOGG v. COMMONWEALTH.

Filed December 8, 1881—Not to be reported.

Appeal from Breathitt Circuit Court.

Opinion of the court by Judge Hines, reversing.

Reward—Surrender by persuasion—"The fact that the accused was induced to surrender by persuasion and not taken by physical force" does not deprive the person to whom the surrender was made of his right to the reward offered for the accused's arrest, there being no evidence of collusion or fraud. (Auditor v. Ballard, 9 Bush, 572.)

W. W. McGuire and J. & J. W. Rodman for appellant.

GUTZWILDER v. WAGNER.

Filed December 8, 1881—Not to be reported.

Appeal from Campbell Circuit Court.

Opinion of the court by Chief Justice Lewis, affirming.

1. Improper instruction, not made a ground of the motion for a new trial in a civil case, is not cause for reversal.

2. Notice by surety to the obligee to sue must be given in time to enable him to obtain judgment at the next term after the notice is given.

Notice given more than ten days before the beginning of the term was not sufficient in this case.

E. W. Hawkins for appellant.

F. M. Webster for appellee.

HAMILTON'S ADM'R v. TARLTON, RECEIVER.

Filed December 8, 1881—Not to be reported.

Appeal from Woodford Common Pleas Court.

Opinion of the court by Judge Pryor, affirming.

1. One subscriber to Hamilton College fund was not released because other subscribers became unable to pay their subscriptions.

2. "No interest accruing after his death shall be allowed or paid on any claim against a decedent's estate unless the claim be verified and authenticated as required by law, and demanded of the executor, administrator, or curator within one year after his appointment." (Section 53, article 2, chapter 39, General Statutes.)

No demand is necessary to be made of the personal representative within one year after his appointment in order to entitle the creditor to interest in a case where such representative has filed his petition to settle the estate as an insolvent estate, and has required the creditors to present and prove their claims before a commissioner appointed by the court.

D. L. Thornton for appellant.

L. P. Tarlton and R. A. Buckner for appellee.

STATON v. COMMONWEALTH.

Filed December 8, 1881—Not to be reported.

Appeal from Breckinridge Circuit Court.

Opinion of the court by Judge Pryor, reversing.

1. Indictment of jailer for willfully and negligently suffering a prisoner to escape was insufficient in this case.

Averment that the prisoner was lawfully committed to the jail of Breckinridge county is not an averment of a fact, but of a conclusion of the pleader.

In such a case the Commonwealth must allege and prove the facts showing that the alleged prisoner was lawfully committed to jail, and that having him in custody the jailer permitted him to go at large.

2. Whether a prisoner was lawfully committed is a question of law, and must be determined by the court.

3. Declaring office of jailer vacant on a conviction on an insufficient indictment for willfully and negligently suffering a prisoner to go at large was erroneous in this case, and—

The judgment of conviction and the judgment declaring the office vacant are both reversed.

4. The sheriff was properly placed in charge of the jail and prisoners by the circuit court in this case until the further order of the court, the jailer having permitted a prisoner under an indictment for murder to go at large

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in the streets under the eye of the court. The judgment placing the jail and prisoners under the custody and control of the sheriff is not reversed.

John Allen Murray, Kincheloe & Eskridge and Wm. Lindsay for appellant.

P. W. Hardin for appellee.

STRELOW v. VONDERHIDE'S EX'OR.

Filed December 10, 1881—Not to be reported.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor, affirming.

1. A gift of promissory notes and surrender of possession thereof by an old bachelor to his niece, subject to the condition that the donor should receive the interest accruing on them as long as he should live, is sustained in this case, although the donor made a will just before his death by which he devised all his estate to other persons.

2. The will being probated must be regarded and treated as the last will of the testator, but in this case it is considered as a circumstance conducing to show that no gift was made of the notes in controversy.

3. Declarations of donor made subsequent to the gift are incompetent to explain his object so as to defeat the gift.

O. H. Stratton and Wm. Lindsay for appellant.

Everbach, Bacon & Badger for appellee.

HAND v. FRETSCH, BURKHARDT & CO.

Filed December 10, 1881—Not to be reported.

Appeal from Pendleton Chancery Court.

Opinion of the court by Judge Pryor, reversing.

A surety may show that he was induced to sign the note by the collusion and fraud of the creditor and his principal, and thereby exonerate himself from liability.

Demurrer to answer presenting such a defense in this case was improperly sustained by the lower court.

Duncan & Barker for appellant.

J. H. Pryor for appellees.

MOODY v. MOODY, &c.

Filed December 13, 1881—Not to be reported.

Appeal from Todd Circuit Court.

Opinion of the court by Judge Hines, affirming.

1. Widow is not entitled to dower in land sold by her deceased husband before the marriage.

2. The widow was not entitled to the amount of the note in controversy in this case as against a creditor's claim upon the ground that it represents the proceeds of exempt property.

Ben T. Perkins, Jr., for appellant.

W. L. Reeves for appellees.

FORSYTHE v. LAWLER.

Filed December 13, 1881—Not to be reported.

Appeal from Jefferson Common Pleas Court.

Opinion of the court by Judge Pryor, affirming.

Right to object to a new trial was waived in this case by filing an amended petition after the new trial was granted enlarging the amount originally claimed.

J. L. Clemmens for appellant.

C. B. Muir for appellee.

COCKRILL v. COMMONWEALTH.

Filed December 17, 1881—Not to be reported.

Appeal from Breathitt Circuit Court.

Opinion of the court by Judge Pryor, dismissing the appeal.

1. Order of circuit court refusing to certify claim for a reward is not subject to appeal.

If the proof of the claim is insufficient the claim may be again presented and proved before the circuit court at a subsequent term.

2. Bill of exceptions signed by bystanders, in which they certify that it is "substantially correct as well as they remember," is insufficient.

S. H. Patrick for appellant.

P. W. Hardin for appellee.

COMMONWEALTH v. MATTHEWS.

Filed December 17, 1881—Not to be reported.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Hargis, affirming.

A druggist who is a regular physician need not make out for himself prescriptions, prescribed and filled by him as such physician and druggist for others, and preserve them as a protection from prosecution. (*Boyd v. Commonwealth*, MS. opinion, January 10, 1879.

P. W. Hardin for appellant.

Samuel H. Crossland for appellee.

IRVINE, & Co. v. WALKER.

Filed December 17, 1881—Not to be reported.

Appeal from Madison Common Pleas Court.

Opinion of the court by Judge Pryor, affirming.

A private sale of an infant's real estate, made in the year 1850 by order of the chancellor, is held to be valid in this case under the statute then existing. The court, however, say: "We are not to be understood as determining that under our present statute regulating the sales of infant's estate that the chancellor can order the guardian to make a private sale."

Jno. Bennett for appellants.

T. J. Scott for appellee.

MAY v. COMMONWEALTH.

Filed December 17, 1881—Not to be reported.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Hines, reversing.

1. "Law of self-defense is, that if the accused did the shooting under circumstances from which he had reasonable grounds to believe, and did believe, that he was then in danger of losing his life or of suffering great bodily harm at the hands of the person shot, the accused was justified."

2. Evidence showing that the accused was in no danger was incompetent in this case.

Evidence was admitted showing that the person killed had declared that the difficulty was all over, and that he did not want the pistol which was offered him. These remarks, however, were never communicated to the accused. The court say: "The inquiry always is, what was the danger as it appeared to the accused, and not what the danger actually was," and the evidence is held incompetent.

Buckner & Allen and Breckinridge & Shelby for appellant.

P. W. Hardin for appellee.

FARRELL v. COMMONWEALTH.

Filed December 17, 1881—Not to be reported.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Pryor, affirming.

Larceny is not a degree of the offense of robbery.

The defendant in this case was indicted for robbery. "There was proof conducing to show that it was a taking without force; and in that view of the case the defense asked an instruction in regard to petty larceny, and it was refused."

The judgment is affirmed.

T. F. Hallam for appellant.

P. W. Hardin for appellee.

SUTTERFIELD v. COMMONWEALTH.

Filed December 17, 1881—Not to be reported.

Appeal from Washington Circuit Court.

Opinion of the court by Judge Hines, reversing.

Right of person attacked to pursue his assailant until he has secured himself from all danger.

Under the facts of this case the court decides that the following instruction, which was refused, should have been given:

"A person free from fault when attacked by another, who manifestly intends by violence to take his life or to do him some great bodily harm, is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger; and if he kill in so doing, it is justifiable self-defense, and if Sutterfield, under the circumstances above stated, believed he had reasonable grounds to believe that his only safety was to pursue Butler and kill him, then the jury should acquit the defendant."

The court say: "Ordinarily this instruction would be objectionable because abstract, but under the facts of this case it is peculiarly applicable."

T. C. Bell and John W. Lewis for appellant.

P. W. Hardin for appellee.

FAULKNER v. JENNINGS, &c.

Filed December 17, 1881—Not to be reported.

Appeal from Garrard Circuit Court.

Opinion of the court by Chief Justice Lewis, affirming.

1. "The duty of the husband and father to support his family is paramount to that of paying his debts."

2. The payment of an encumbrance upon his wife's land by the husband did not, under the facts of this case, constitute a fraud upon his creditors, nor subject the land to the payment of his debts to the extent of the amount paid by him to remove the encumbrance.

The land in controversy was devised by her father to Mary D. Jennings, and was occupied by her and her husband for several years previous to and until the death of the testator free of rent or charge. After the death of the testator his personal property was found insufficient to pay the debts against his estate, and the land in controversy, together with several other parcels of land, was charged with the payment of the deficiency. To prevent the sale of her land Mary D. Jennings's husband paid off this encumbrance out of his own means. The court hold that the occupation of the land free of rent previous to the death of the testator, was a sufficient consideration therefor.

Jas. A. Anderson for appellant.

J. S. VanWinkle and R. P. Jacobs for appellees.

STEPHENS v. REAVIS.

Filed December 1, 1881—Not to be reported.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Hargis, reversing.

1. Oral contract to convey land can not be specifically enforced.

2. Part performance of an oral contract to convey land is not sufficient in this State to take the contract out of the statute of frauds.

3. Advancement of money, etc., by father to his daughter could not be revoked by him in this case, the gift having been completed by delivery to the daughter's husband.

4. The occupant of real estate under an oral gift, which is afterwards repudiated by the donor, is not liable for rents until demand of possession has been made.

The donor in this case repudiated by his will the oral gift of the land, and afterwards his devisee instituted suit and recovered judgment against the donee for rents from the time of the donor's death. The court held that the devisee was entitled to recover rents only from the institution of the suit, no previous demand having been proved.

Rodes & Settle and E. W. Hines for appellant.

Wright & McElroy for appellee.

The overworked Court of Appeals is so far behind with the business of the court as to demand the most serious consideration and some efficient action of the present general assembly.

When the court met on the first day of the January term, 1882, it had over 700 cases already submitted for decision, and found upon the docket 561 cases to be heard during the term, making over 1,200 cases, each and all of which, in justice to the litigants, ought to be decided by or before the 1st of July.

During the last September term the court decided 252 cases.

If the court should decide 350 cases before the 1st day of July it will then be over 800 cases behind.

Justice to litigants in that court requires that some relief should be devised and enacted or that a law should be passed requiring it to decide all the cases already submitted before it proceeds any further with the call of the docket of new cases.

The Indiana Supreme Court, at the commencement of its November term, 1881, had 1,164 cases submitted and under advisement, 17 cases pending on petitions for a rehearing, and 392 cases on the docket for that term.

The legislature of Indiana, at its last session, created a judicial commission to aid the Supreme Court of that State to dispose of the business of that court. The present legislature of this State might profit by an examination of the Indiana statute.

The present general assembly is working very well, but giving too much attention to local affairs at the expense of more important and much needed general legislation imperatively demanded by the exigencies of the times.

We regret to see a slight disposition in the legislature to fetter rather than to encourage railroad enterprises in this State. We say by all means be not only just but generous to all projected railroad enterprises in this State, as its coal, iron and timber interests will be developed by them.

Bardstown, December 23, 1881.

Editors Kentucky Law Reporter:

I see that in some counties women have announced themselves as candidates for clerk of the county courts. I hold that they are ineligible to hold a constitutional office. Section 2, article 7, says: "No person shall be eligible to the office of clerk unless he shall have procured from a judge of the Court of Appeals, or a judge of the circuit court, a certificate that he has been examined by the clerk of his court under his supervision, and that he is qualified for the office for which he is a candidate."

When the Constitution says "he" it does not include or mean "she."

Suppose a married woman was elected clerk, could she execute bond as required by law? No. Because she can not bind herself by such obligation.

In the year 1853 the jailer of Nelson county died; the county court appointed his widow to fill the vacancy, which was certified to the governor for her commission. Lazarus W. Powell was then governor, and James Harlan, Sr., was attorney-general. The question was then raised whether a woman was eligible to hold an office created by the Constitution, and it was decided by the governor and attorney-general that she could not.

* * *

ACTIONS TO SET ASIDE FRAUDULENT CONVEYANCES.

1st. Does an attachment confer jurisdiction in such actions?

2d. Must a creditor have a judgment and return of no property found before he commences such an action?

3d. Was the act of 1838 repealed by the Code and General Statutes?

These questions are discussed in editorial note to *Vance v. Campbell, &c.*, ante, 450-464.

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EXPERT TESTIMONY.

The law requires the best evidence of which the nature of the case will admit. Primary evidence (if it can be produced) must be produced. If it can not be had then secondary evidence is admissible.

The nature of testimony is varied, ranging all the way from certainty to improbability.

Opinions belong to that indefinite branch of testimony which can not, in any case, satisfy the mind to the exclusion of a reasonable doubt, but may furnish ground for a reasonable belief.

Expert testimony consists of opinions, and must, therefore, be defined as secondary evidence, and as belonging to that class of proof which is not to be received in any case, except when the nature of the case will not admit of more positive evidence. Although it may be said that this is an unsatisfactory class of proof and ought always to be received with caution, and never to be emphatically relied upon, yet it can not be said that it ought not to be received at all. In certain cases opinions are not only material in giving some explanations, more or less reasonable and convincing concerning the question in issue, but furnish the only method of ascertaining the truth of the matter. Opinions, therefore, may prove advantageous in some trials, though in general they may be con-

sidered as an uncertain and unsatisfactory method of arriving at a conclusion. In view of the admissibility of expert testimony it becomes necessary for the student to inquire who are experts; what is expert testimony, and when is it admissible?

DISTINCTION BETWEEN OPINIONS OF EXPERTS AND PROFESSIONAL WITNESSES.

In discussing the subject of opinions, however, it will be necessary to draw the distinction between the opinions of experts and the opinions of nonexperts.

Each class of opinions is admissible in many cases, and often both experts and nonexperts may testify in the same case. But the rules governing the admission of these two classes of evidence are not the same. For instance, while the opinion of an expert may often be predicated upon a hypothetical statement of a case, the opinion of a nonexpert can never be taken upon such a hypothesis. Then in regard to the subject of insanity, the expert may have had no experience as to the particular case; may not even have had a previous acquaintance with the individual in question; but may give an opinion from hearing the evidence, or upon a hypothesis based upon the evidence, while the nonexpert must speak as to insanity from his personal observation of the individual during a familiar acquaintance (14 Gray, 385). So as to handwriting and many other subjects.

DEFINITIONS.

In Bouvier's Dictionary experts are defined as follows: "Experts (from Latin *experte*): Skilled by experience—persons selected by the court or parties to a cause, on account of their knowledge or skill, to examine, estimate and ascertain things, and make a report of their opinions (Merlin Repert). Witnesses who are admitted to testify from a peculiar knowledge of some art or science; a knowledge of which is requisite or of value in settling the point at issue."

He also quotes the following definitions: "Persons professionally acquainted with the science or practice in question. (Strickland's Evidence, 408). Persons conversant with the subject-matter on questions of science, skill, trade and other like kind." (Best on Evidence, page 346.)

An excellent definition is found in *Jones v. Tucker*, 41 N. H., —, where it is said: "He must have made the subject on which he gives his opinion a matter of particular study, practice or observation, and he must have particular or special knowledge on the subject. (*Page v. Parker*, 40 N. H., 47.)

In *Folk v. Chad*, 8 Douglas, 157, experts are termed "men of science."

In *Greenleaf's Evidence*, paragraph 445, volume 1, we find the following definition: "On questions of science, skill, or trade, or others of the like kind, persons of skill, sometimes called experts, may not only testify to facts, but are permitted to give their opinions in evidence."

In *Beard v. Kidd*, 11 New Hampshire, 397, experts are described as "persons possessed of some particular science or skill respecting the subject-matter."

"An expert has been defined to be a witness who testifies as to conclusions from facts, while an ordinary witness testifies only as to facts. The definition, however, is not sufficiently exact. Few witnesses called to detail facts reproduce such facts as they exist. Apart from the psychological question whether what we see is perceived or is inferred by us, most acts to which we testify are necessarily inferred, not actually witnessed. We must, therefore, penetrate further if we seek to distinguish between the expert and the nonexpert. And the true distinction is this, that the nonexpert testifies as to conclusions which may be verified by the adjudicating tribunal; the expert to conclusions which can not be so verified. The non-expert gives the result of a process of reasoning familiar to every-day life. The expert gives the result of a process of reasoning which can be mastered only by special scientists. (*Wharton's Evidence*, paragraph 434, volume 1.)

In *Wharton's Evidence*, paragraph 439, volume 1, it is said that "a general knowledge of the department to which the specialty belongs would seem to be sufficient."

ADMISSIBILITY.

In *Tullis v. Kidd*, 12 Alabama, —, it was decided that a physician not practicing may be an expert.

In *Castner v. Sliker*, 33 New Jersey L., 95, 507, physicians not oculists were held competent to testify as to injuries to the eye.

In *Horton v. Green*, 64 N. C., 64, it was decided that physicians not veterinary surgeons may testify as to diseases of horses. But the rule as laid down in *Jones v. Tucker*, already cited, is the better rule.

One of the celebrated English cases is *Folk v. Chad*, 3 Douglas, 159. In this case Mr. Smeaton, who was acquainted with the construction of harbors, the causes of their destruction, and how remedied, etc., was permitted to testify as to the effect of an embankment upon a harbor.

Physicians generally are admissible to state the nature and effects of a disease; the conditions of gestation; the effects of particular poisons on the human system; the effects of a particular treatment; the likelihood that death could be produced by a particular disease, though they have not made such conditions a specialty. But as to a specialty entirely out of his line a physician is not competent. (Wharton's Evidence, volume 1, paragraph 441.)

"The rule for the admission of experts as witnesses places the question of qualification very much in the discretion of the judge presiding at the trial." (6 Rhode Island, 516.)

"The competency of a witness offered as an expert is to be determined by the court, and proof that he is or is not competent to testify as an expert; that he is or is not an expert is not admissible before the jury after the witness is admitted" (*Johnson v. The State of Alabama*, 35 Ala., 37); but he may be questioned as to his experience and observation, and the jury will be authorized to weigh and determine the value of his testimony.

In *Dole v. Johnson*, 50 N. H., 455, it is said:

"The object of all testimony in courts is to place before the jury a knowledge of the facts pertaining to the case under consideration, and it is a serious departure from this purpose even to admit, instead of actual knowledge mere opinion, however correct it may possibly be; and, therefore, opinion, if admitted at all, should be as nearly approximated as possible to the actual knowledge of facts for which it is substituted, and it

should always be required of an expert that he should be sufficiently acquainted with the subject-matter of his testimony to know what its laws are and not merely to conjecture or have an idea about it."

In *Jones v. Tucker*, 41 N. H., 547, it is said:

"He must have made the subject on which he gives his opinion a matter of particular study, practice, or observation, and he must have particular and special knowledge on the subject."

In *Page v. Parker*, 40 N. H., 59, the court say:

"Upon questions of skill or science with which a jury may not be supposed to be familiar, men who have made the subject-matter of their inquiry the object of their particular attention or study, are competent to give their opinions.

"It must, however, be first shown that they are skillful or scientific men, or at least that they have superior actual skill or scientific knowledge in relation to the question before their opinions are competent," and that mere opportunity for observation is not sufficient.

"By the Roman law experts (*Arts Periti*) could be called by the *judex* at his own discretion (when not called by the parties) in order to acquaint himself with physical laws or phenomena of which he was not personally cognizant. The common law seems to have adopted the same practice. (*Wharton's Evidence*, volume 1, note 2 to paragraph 484.)

"It makes no difference what is the specialty with which the witness is conversant. If its laws are not familiar to the ordinary business man they must be proved, and their application to the case in issue shown by an expert. (*Matteson v. R. R.*, 62 *Barber*, 864.)

"When a witness is offered as an expert three questions necessarily arise:

"1st. Is the subject concerning which he is to testify one upon which the opinion of an expert can be received?

"2d. What are the qualifications necessary to entitle a witness to testify as an expert?

"3d. Has the witness those qualifications?

"The rule determining the subjects upon which experts may testify and the rule prescribing the qualifications of experts are matters of law; but whether a witness offered as an expert

has these qualifications is a question of fact, to be decided by the court at the trial.

"Experts may give their opinions upon questions of science, skill or trade, or others of like kind, or when the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it, without such assistance, or when it so far partakes of the nature of a science as to require a course of previous habit or study, in order to the attainment of a knowledge of it; and the opinions of experts are not admissible when the inquiry is into a subject-matter, the nature of which is not such as to require any peculiar habits of study in order to qualify a man to understand it." (1 Greenleaf, section 440; 1 Smith's Leading Cases, 286; *Rochester v. Chester*, 3 New Hampshire, 349; *Peterborough v. Jaffry*, 6 New Hampshire, 462; *Whipple v. Walpole*, 10 New Hampshire, 180; *Beard v. Kirk*, 11 New Hampshire, 397; *Robertson v. Stark*, 15 New Hampshire, 109; *Marshall v. Ins. Co.*, 27 New Hampshire, 157; *Concord Railroad v. Greeley*, 28 New Hampshire, 237-243; *Jones v. Tucker*, 41 New Hampshire, 546; *Dole v. Johnson*, 50 New Hampshire, 455.)

In the examination of a medical witness the true rule is to state a hypothetical case, and ask his opinion thereon. (*Hoard v. Peck*, 56 Barb., 202; *Wharton's Evidence*, volume 1, 452.)

Where the question is purely one of skill or science, the skillful or scientific witness gives his opinion; not a mere speculative opinion, but an opinion which in some cases may amount to absolute or certain knowledge. In other cases knowledge not amounting to absolute certainty, but supported by facts, by observation, by knowledge of the properties of things, of the effects of one thing upon another, of the relation of things by the known and established laws of physic or the like. There are also cases where the question is not one of science or skill in which witnesses are permitted to express their opinions. And in these cases the witnesses need not be men of skill or science. In these cases, too, the opinion given is not a speculative opinion, but is knowledge which may amount to certainty, or may not. Illustrations of this latter class of cases are furnished whenever witnesses are called to establish the identity of an individual, to prove the hand-

writing of anyone or to testify concerning the sanity or identity of an individual with whom the witness is intimately acquainted.

There are many things which the mind may clearly apprehend, and yet the mental process can not be explained so as to be understood by others. * * *

In all these cases the opinion of the witness is received because the facts which constitute the cause from which the opinion proceeds as an effect can not themselves be presented or communicated to the mind of a jury so as to impart to them the knowledge which the witness actually possesses. (Cooper v. The State, 28 Texas, 388.)

RULE GOVERNING THE ADMISSION OF EXPERT TESTIMONY.

Whenever a condition of things is such that it can not be re-produced and made palpable in the concrete to the jury, or when language is inadequate to such realization, then a witness may describe it by its effect on the mind, even though such effect be opinion. (Wharton's Evidence, volume 1, 509.)

If any further distinction should be deemed necessary it might be said that expert testimony is not admissible upon questions of plain fact, easily demonstrated and understood, but may be admitted whenever special learning or special information may give the court or jury an insight into the merits of a case which could not be otherwise obtained.

For instance, a witness may not give his opinion that a certain writing is a will. The form and substance of a will is regulated and fixed by law, and the paper itself must be produced and examined in order for the court or jury to determine whether it is a will or not. The examination of the document is the best test, and is eminently more satisfactory than any opinion, hence the paper must be produced, and no opinion as to its nature can be substituted for the document itself. But suppose that a will in proper form is produced in evidence, and there appears in the body of the instrument interlineations which materially change the meaning of the will from its original reading. The question arises, were these changes made by the testator? Are the interlineations a part of the will? In order to determine this question there may be no definite information. The original will may be in the

handwriting of the testator; he is dead; the subscribing witnesses may recognize their signatures, and may remember that in their presence the testator wrote and signed the original document; they may not be able to state whether or not he interlined it; it is important to decide this; the question is as serious as at the beginning, for it resolves itself into the same issue as at first: "Is this the will of the testator as it now reads? Did he interline and alter it, or is the interlineation a forgery?" In the absence of positive evidence the law allows that which comes next. Witnesses familiar with his handwriting may give their opinions as to whether the interlineations are in the same handwriting as the original. Experts may also compare and testify as to their opinion as to the genuineness of the interlineations (though in some States, including Kentucky, they may not give opinions on that question further than to point out the differences in the formation of the letters, and as to evidences of erasures and insertions, &c). (*Hawkins v. Grimes*, 13 Ben Monroe. 262-4.)

So also, upon a plea of non est factum, witnesses may not be found to say whether or not they saw the party sign the paper in question. Opinions may then be given by persons familiar with his handwriting as to whether or not the signature in the body of the writing in question is in his handwriting.

Experts may also testify as to whether or not, in their opinion, the signature and body of the writing are in the same handwriting as other writings in the record written by the party in question. And writings of his which he is estopped to deny, such as official returns, signatures to the pleadings and the like, may be used for the purpose of comparison. But here again the distinction must be drawn as to experts and nonexperts. For while a nonexpert may give his opinion as to whether or not the signature in question is genuine, it would seem that he must do so from a knowledge of the handwriting, and not by mere comparison, as experts may.

To further illustrate: A and B make a trade. It is sought to rescind the contract upon the grounds of fraud. C is a witness. He knows the terms of the contract. He was present when it was made. He may know, or he may not know, that one of them defrauded the other. But he must not, upon the witness stand, undertake to give his opinion upon that ques-

tion. He knows the facts and must state them. His province is not to decide upon the facts, but to state them. He can not be permitted to substitute himself for the court or jury, and try the issue by stating that A defrauded B, or that B dealt fairly with A. But suppose that A had sold a horse to B. The witness is a veterinary surgeon. He is a judge of horses and their diseases. B complains that the horse was unsound. If the witness knew the horse in controversy, he may give his opinion as to whether or not, at the time of the sale, he was diseased, and what disease it was, if any, that affected him. We quote further, viz:

"The general distinction is that the jury must judge of the facts for themselves, but that whenever the question depends upon the exercise of peculiar skill and knowledge that may be made available, it is not a decision by the witness or a fact to the exclusion of the jury, but the establishment of a new fact, relation or connection which would otherwise remain unproved." (Roscoe's Criminal Evidence, 158 (184); Greenleaf's Evidence, volume 1, 441.)

But in cases where the facts are susceptible of distinct proof, and can be laid before a jury so as to enable them to draw their own conclusions, and where their conclusions do not depend upon skill in any particular art or science, the naked opinion of witnesses is not proper evidence. (Lester v. Town of Pitsford, 7 Vermont, 162.)

"Opinions of nonprofessional witnesses as to the insanity of the accused may be admitted as evidence by the court. But the court must be satisfied before admitting such opinions that the witness has had an opportunity, by association and observation, to form an opinion as to the sanity of the person in reference to whom he is to speak or give his opinion.

"An expert should not be allowed to express his professional opinion as to the sanity of the accused when there is no hypothetical case or agreed facts submitted to him, nor from the evidence of other witnesses, when he did not hear all the evidence of such witnesses. But he may give such opinion from acquaintance and observation which enables him to judge of the mental condition of the person whose sanity is questioned." (Brown v. Commonwealth, 14 Bush, 409-410.)

"A witness not an expert may give his opinion as to the sanity of a party, but is not competent to express an opinion on matters not within his knowledge, but hypothetically submitted to him." (14 Gray, Mass., 885.)

OPINIONS OF NONEXPERTS.

The state or appearance of a building or of a public document which the law will not allow to be removed from its depository may be explained by a term expressing a complex idea, such as that it looked old, decayed or fresh, or was in good or bad condition. So also may the feelings or emotions of the mind of a party whose psychological condition is in issue. A witness may state whether on a certain occasion such person looked pleased, excited, composed, agitated, frightened or the like. (Best on evidence, section 849; *Pelormourges v. Clark*, 9 Withrow, Iowa, 16.)

Chief Justice Foster, in *Hardy v. Morril*, 56 N. H., 241, says: "But without any recognized rule or principle, all concede the admissibility of opinions of nonprofessional men upon a great variety of unscientific questions arising every day, and in every judicial inquiry.

"These are questions of identity, handwriting, quantity, value, length, measure, term, distance, velocity, form, size, age, strength, heat, cold, sickness and health. Questions also concerning various mental and moral caprices of humanity, such as disposition and temper, anger, fear, excitement, intoxication, veracity, general character and particular phases of character, and other conditions and things, both moral and physical, too numerous to mention."

As a general rule the opinions of witnesses who have not some peculiar skill or professional knowledge in relation to the matter in issue are not admissible in evidence, although such opinions are derived from the witness's personal observation, and are sought to be given in evidence in connection with the facts on which they are based. Some exceptions to this rule, as where the question is as to the sanity of a person, or the value of property, or as to height and distance, or the size or appearance of objects. (*Crane & Wife v. Northfield*, 88 Vermont, 124.)

In *Norman v. Wells*, 17 Wendall N. Y. Rep., 161, the court say:

"The ordinary and, in general, the only legal course is to lay such facts before the jury as have a bearing on the question of damages, and leave them to fix the amount; they are the only proper judges. I know that in questions of insanity some courts allow witnesses to throw in their opinions from what they have seen and heard. But I always found that such cases were much better tried where opinions were kept entirely out of view, and I have generally excluded them except when they came from professional men. The little consideration due to such testimony is shown by the present chancellor in *Clark v. Fisher*, 1 page 178."

In *Jefferson Insurance Co. v. Cotheal*, 17 Wendell, 78, Judge Sutherland says: "On questions of science or skill or trade, persons of skill in those particular departments are allowed to give their opinions in evidence.

"But the rule is confined to cases in which, from the very nature of the subject, facts disconnected from such opinions can not be so presented to the jury as to enable them to pass upon the question with the requisite knowledge and judgment.

* * All such cases are exceptions, and they ought not to be rashly multiplied even under the limitations imposed." (*Harger v. Edwards*, 4 Barbour N. Y., S. C., 12, 256; 16 Shepley, 317.)

In *McKee v. Nelson*, 4 Cowen, 355, in regard to the admission of opinions to the effect that plaintiff (in a breach of promise case) had been tenderly attached to the defendant, the Supreme Court of New York said:

"It is true as a general rule that witnesses are not allowed to give their opinions to a jury, but there are exceptions, and we think this is one of them. There are a thousand nameless things indicating the existence and degree of the tender passion which language can not specify. The opinions of witnesses on the subject must be derived from a series of instances passing under their observation which yet they never could detail to a jury."

In *Brown v. Commonwealth*, 14 Bush, 406, Judge Hines says: "An eye may menace, it may plead, it may languish with love, it may sparkle with mirth, it may show idiocy or

insanity, and while these several manifestations may be as patent to the mind of the observer as any material substance could be, and he may be as conscious of the condition of the mind, character or emotions indicated by them as he is of his own existence, yet the probabilities are that the most skillful word painter would utterly fail in an attempt to make these evidences substantive and tangible to another."

On a question of the mental capacity of the grantor in a deed the opinion of an intimate acquaintance, though not a medical man, is competent.

The value and force of the opinion depends upon the general intelligence of the witness, the grounds upon which it is based, the opportunities he has had for full and accurate observation, and his entire freedom from bias.

The general rule is that a witness must speak to facts, and that mere opinion is not admissible. "The books make a distinction also between the subscribing witnesses to a will and other witnesses, called to the question of testamentary capacity, holding that the former may testify to those opinions in respect to the sanity of the testator at the time of executing the will, and that the latter must speak as to facts; for the law has placed the subscribing witnesses about the testator to ascertain and judge of his capacity. The recent case of *Sears v. Shafer*, 1 Barb., S. C. Reps., 408, before Barculo, judge at the special term, is not in conflict with these principles. The learned judge states the general rule to be that it is for the court and not for the witness to form an opinion from the facts. He correctly makes the exception in the case of the subscribing witnesses to a will, who are allowed to express their opinions, and by implication he sanctions the other exceptions which allow witnesses (not experts) to express their opinions of the capacity of the testator in connection with facts and circumstances within their knowledge, disclosed by them at the trial. Unless such opinions are supported by good reasons and founded on facts they are entitled to no regard." (*Culver v. Harlem*, 7 Barb., 324-325.)

AS TO HANDWRITING.

In England comparison of handwriting alone is not sufficient to convict a person of crime. The reason for the rule is well

stated by Chief Baron Gilbert. In his *Laws of Evidence*, 54, 55, he says: "The distinction has ever been taken that comparison of hands is evidence in civil and not in criminal cases. * * * The comparison of hands serves for a distinction in civil commerce, for the likeness does induce a presumption that they are the same, and the presumption is evidence until the contrary appears. For every presumption that remains uncontested hath the force of an evidence, for light proof on one side will outweigh the defect of proof on the other. But in criminal prosecutions the presumption is in favor of the defendant. * * * When the comparison of hands is the only evidence in a criminal prosecution, there is no more than one presumption against another, which weighs nothing."

The Supreme Court of Illinois has decided in accordance with this view of the law. (*Jumpertz v. The People*, 21 Illinois, 875; *Greenleaf's Evidence*, volume 1, note 1 to section 576.)

It is conceded that the general rule is that comparisons of handwriting is not evidence. There are some admitted exceptions:

1st. When writings are of such antiquity as not to be susceptible of proof in the ordinary way, yet not so old as to prove themselves.

2d. When other writings, clearly proven or admitted, are already before the jury, they may compare.

3d. When writings are introduced as evidence which the opposite party is estopped to deny.

An expert must either be familiar with the handwriting of the person whose writing is in dispute, or else he must be a competent judge when he gives his opinion of the identity of handwriting, and confine his examination to such writings for comparison with the disputed signature as belong within the foregoing exceptions. To this extent comparison of handwriting is allowable in Kentucky, except in the case of interlineations in a will disputed as being genuine, when an expert is not familiar with the handwriting and is introduced to give an opinion upon comparison only. He may then state in what respect as to size, shape and form of letters the handwritings differ, but it is not competent for him to give his opinion as to whether or not the handwriting is the same in both writings. This differs from the common law rule. There may be some

other exceptions (*Woodard v. Spiller*, 1 Dana, 480; *Hawkins v. Grimes*, 18 Ben Monroe, 267; *Greenleaf's Evidence*, volume 1, 576 to 589; *Northern Bank v. Buford*, 1 Duvall, 389). But evidence of an expert as to the length of time elapsed since the writing was done, based upon comparison, is not admissible. (*Sackett v. Spencer*, 29 Barb. N. Y. Reports, 180.)

"In an action for libel, comparison of hands by cashiers of banks who had never seen the defendant write and had no knowledge of his handwriting, but who had compared the paper in question with other writing proved to be his, and who testified that the papers were written by the same hand, and that the writing in question was a disguised hand, was admitted as evidence in *Lyon v. Lyman*, 9 Conn., 55.

"A person who is engaged in the exchange business and the teller of a bank, each of whom has a knowledge of counterfeit bills and of the genuine notes of the bank which the prisoner is charged with counterfeiting, and who had frequent dealings with such bank in relation to its notes, may each testify as an expert as to the genuineness of the notes charged to be counterfeits." (*Johnson v. State of Alabama*, 35 Alabama, 37.)

In *Page v. Parker*, 40 New Hampshire, 40, it was held that "upon questions of skill or science, men who have made the subject-matter of inquiry the object of their special attention or study may give their opinion in evidence, but that mere opportunity for observation is not sufficient," and this rule should apply to all cases where witnesses are introduced to compare handwriting.

"Evidence of merchants and others who are in the habit of receiving, scrutinizing and paying out bank bills is competent to prove them counterfeit." (*Walson v. Cresap*, 1 Ben Monroe, 196.)

LAWS OF OTHER COUNTRIES.

In proving the unwritten laws of foreign countries the opinions of competent witnesses are admissible. Written laws must be proven by attested copies. Thus on the trial of *the Wakefields* for abduction, a gentleman of the Scotch bar was examined as to whether the marriage, as proven by the witness, would be a valid marriage, according to the law of Scot-

land (*R. v. Wakefield*, Murray's Edition, page 288). So it is laid down by a foreign writer of eminence that foreign unwritten laws, customs and usages may be proved, and indeed must ordinarily be proved by parol evidence. The proper course is to make such proof by the testimony of competent witnesses (instructed in the law) under oath. (*Sussex Peerage Case*, 11 Cl. and Fin., 115; *Cock v. Purday*, 2 C. and Kin., 269; 61 E. C. L. R. I.)

AS TO AGE.

The mere opinion of a witness with regard to the age of a person, from his appearance, unaccompanied by the facts on which that opinion is founded, is inadmissible as evidence. (*Morse v. The State*, 6 Conn., 9.)

SURVEYING.

Practical surveyors have invariably been permitted to express their opinions, whether the marks on trees, piles of stone, etc., were intended as monuments or boundaries; whether a particular mark indicated a corner or was a mere witness; whether a given line was an ancient or a recent line; and whether it was a surveyor's line or one marked by hunters. (*Culver v. Harlem*, 7 Barb. N. Y., 326.)

A surveyor may testify as to the boundary line between two counties which has never been officially located. (*Kinley v. Crane*, 84 Penn. St., 146.)

NEGLIGENCE.

In an action for negligence resulting in death, an expert may be asked, from his knowledge of the decedent's age, habits, health and physical condition, how long he would have been useful to his family. (*Penn. R. R. Co. v. Henderson*, 51 Penn. St., 815.)

SPECIAL CASES.

On a question of sanity the mere doubt of an expert is not admissible. (*Sanchez v. The People*, 22 N. Y., 147; S. C., Park, 585; 18 Howard, 72.)

Experts can not be permitted to testify as to the value of professional services in a lump. They must speak of the items in the bill of particulars. (*Barker v. Cairo & Fulton R. R. Co.*, 85 C., 828.)

The testimony of experts is admissible to prove the technical meaning of words used in trade and commerce. (*Child v. Sun Mutual Insurance Co.*, 3 Sand., 26.)

The opinion of witnesses acquainted with real estate are competent as to value. (*Clark v. Baird*, 9 N. Y., 188; *Brill v. Flager*, 28 Wendell, 854; *Joy v. Hopkins*, 5 Den., 84.)

A medical expert may give his opinion as to the disease of which a horse died. (*Pierson v. Hoag*, 47 Barb., 243.)

Farmers having experience in regard to cattle may give their opinion as to their disease and treatment. (57 Barb., 604; *Burden v. Pratt*, 1 S. C., 554.)

DAMAGES.

When the thing damaged is one of every day use, whose depreciation an ordinary business man can estimate, then such an observer may be called to express his opinion of the extent of the damage sustained. If the facts which form the basis of such an opinion can be specified they must be stated. If the conclusion is one which the jury can draw, then to the jury must be left the drawing of the conclusion. But when, as is often the case, these facts can be best expressed by the damage they cause, then the damage and its extent may be testified to by the witness.

On the other hand, when the injury sustained is of an occult character, of which only an expert can properly judge, or when the knowledge of the value is special, belonging not to business men generally, but only to specialists, then if opinion as to damage is to be proved a specialist must be called to give such opinion, and ordinary observers are inadmissible for the purpose. (*Wharton*, volume 1, page 450.)

AS TO PERSONAL INJURIES.

An expert may give his opinion as to the manner by which a fatal wound may have been produced. (*People v. Rogers*, 18 Abb. Pr. N. S., 870.)

A physician who has attended a person injured may testify as to the effect produced by such injury upon his health and mind. (*Anthony v. Smith*, 5 Bos., 503.)

Evidence of physicians, based in part upon the complaints of a person injured at the time of the injury, is competent. (*Matteson v. N. Y. Central R. R. Co.*, 85 N. Y., 487.)

In an action by a husband against a druggist for clandestinely selling large quantities of laudanum to his wife, from day to day, to be used as a beverage, a physician may be asked what would be the natural result of the use thereof upon the wife's health. (*Hoard v. Peck*, 56 Barb., N. Y., 202.)

VALUE OF EXPERT TESTIMONY.

When expert testimony was first introduced it was regarded with great respect. An expert, when called as a witness, was received as the representative of the science of which he was professor, giving impartially his conclusions. Two conditions have combined to produce a material change in this relation.

Few specialties are so small as not to be torn by factions, and often the smaller the specialty the bitterer and the more inflaming and destroying are the animosities by which these factions are possessed. Peculiarly is this the case in matters psychological, in which there is no hypothesis so monstrous that an expert can not be found to swear to it on the stand, and to defend it with vehemence when off the stand. "*Nihil tam ab surdum quod non dictum sit aliquo philosophorum.*"

In the second place, the retaining of experts by a fee proportioned to the importance of their testimony is now, in cases in which they are required, as customary as the retaining of lawyers. No court would take as authority the sworn statement of the law given by counsel retained on a particular side, for the reason that the most high-minded men are so swayed by an employment of this kind as to lose the power of an impartial judgment; and so intense is this conviction that in every civilized community the reception by a judge of presents from suitors visits him not only with disqualification but with disgrace, hence it is that, apart from the partisan temper more or less common to experts, their utterances, now that they have as a class become the retained agents of parties, have lost all judicial authority and are entitled only to the weight which a sound and cautious criticism would award to the testimony itself.

In adjusting the criticism a large allowance must be made for the bias necessarily belonging to men retained to advocate a cause, who speak not as to fact but as to opinion, and who

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are selected on all mooted questions either from their prior advocacy of or readiness to adopt the opinion to be proved.

In *Brown v. The Commonwealth*, 14 Bush, 407, the Court of Appeals say on this point: "Those who have had anything like an extensive practice of law know how unreliable and worthless is the evidence of the average expert. Often the opinion is honestly formed and expressed to suit some pet theory that has no foundation in fact or experience, and sometimes it occurs that an overweening desire to place a rival practitioner in an unfavorable light before the jury and the local public leads the expert to the expression of an opinion that is not the result of observation and experience, and does not correspond with the deductions that should be made from the facts.

"Frequently such persons are called from a distance to express an opinion after a momentary examination, or an opinion based upon a hypothetical case imperfectly stated. It is not reasonable to suppose that such an opinion of an expert would be entitled to as much weight as that of an intelligent nonprofessional man who had for many years been an intimate associate of the person in reference to whose mind he was called to speak; or, to say the least, there appears no reason why the opinion of such an expert should go to the jury and that of the nonprofessional be excluded. The evidence of the one or the other will be entitled to consideration in proportion to his intelligence and opportunities for forming an opinion, and the jury may be safely entrusted with the duty of comparing and weighing them."

The foregoing, I think, contains a summary of the law of experts' testimony applicable to the cases usually requiring its introduction in our courts.

ISAAC T. WOODSON.

KENTUCKY COURT OF APPEALS.

FLEETWOOD v. COMMONWEALTH.

(Filed January 5, 1882.)

1. A peace officer has the right, and it is his duty, to arrest one who is committing a breach of the peace in his presence, and to use such force as may be necessary to effect the arrest.

2. If a person disturbing the peace resists a peace officer, and in so doing kills said officer, he is guilty of murder if he knew that the person attempting to make the arrest was an officer, and guilty of manslaughter if he did not know it.

3. The law of self-defense as applicable to rencounters between private persons does not apply in such a case unless the person resisting the arrest has reasonable grounds to believe, and does believe, that the officer is not acting in good faith in the attempt to arrest, but is using his official position to gratify personal feeling against the person sought to be arrested, and that by submitting to arrest he will be in danger of great bodily harm or of losing his life.

Appeal from Scott Circuit Court.

Opinion of the court by Judge Hines.

Appellant was indicted for the murder of Mefford, tried, convicted and sentenced to the penitentiary for life.

Appellant was at a public gathering, with a pistol in his hand, disturbing the peace by cursing, loud talking and threatening to shoot a certain person, when Mefford, a constable, attempted to arrest him, and being resisted was, by appellant, shot and instantly killed.

A peace officer has the right, and it is his duty, to arrest one who is committing a breach of the peace in his presence, and to use such force as may be necessary to effect the arrest, and if the person disturbing the peace resists arrest and in so doing kills the officer, he is guilty of murder if he knew that the person attempting to make the arrest was an officer, and guilty of manslaughter if he did not know it. The law of self-defense as applicable to rencounters between private persons does not apply unless the person resisting the arrest has reasonable grounds to believe, and does believe, that the officer is not acting in good faith in the attempt to arrest, but is using his official position to gratify personal feeling against the person sought to be arrested, and that by submitting to arrest and to being disarmed he will, by reason of this fact, be in danger of great bodily harm or of losing his life. The officer being in the right

and in the discharge of his duty, the person resisting arrest does it at his peril, and if he kill he is guilty of murder or manslaughter, as it may appear that he knew or did not know the character in which the officer was acting. This view of the law was presented to the jury more fully and with more clearness than in any case that has come under our observation. The accused has no ground of complaint that the law was not properly expounded or that the whole law was not given. (*Mackabee v. Commonwealth*, 78 Ky., —; *Earl's Pleas of the Crown*, volume 1, page 302.)

Judgment affirmed.

W. C. P. Breckinridge for appellant.

P. W. Hardin for appellee.

ROACH, &c. v. AMES' ADM'R.

MATTHEWS' EX'OR v. SAME.

(Filed January 10, 1882.)

1. Administrator is entitled to the presumption of good faith in the discharge of such duties as are not defined by statute, like any other trustee.

2. Administrator did not make himself responsible to creditors as under section 33, chapter 39, General Statutes, by delivering to the purchaser 12,000 bushels of corn in good faith, in pursuance of contract of his decedent, on which such purchaser had made large advances to his decedent, whose estate was insufficient to pay all his debts.

Appeal from Union Circuit Court.

Opinion of the court by Judge Pryor.

By section 33 of the General Statutes, chapter 39, all debts and liabilities of a decedent are of equal dignity and to be paid ratably in the administration of the estate, except certain liabilities therein specified, and by section 42 of the same chapter, when the personal representative has paid to a creditor in an undue proportion of his demands, he may recover from the creditor, distributee or devisee the amount of overpayment, with the interest thereon. In the case before us the intestate, W. E. Ames, in his lifetime sold to Buckham & Field his crop of corn, estimated at 12,000 bushels, which Ames was to shell, sack and deliver between the first and last of March, to be good, sound, merchantable flint corn, put up and delivered in

good order, at the price of 45 cents per bushel, to be paid for on delivery by the vendees. At the time of the sale and shortly after the purchasers paid to Ames on this sale the sum of \$2,288.26. Ames, before the corn was delivered, died, and the appellee, James H. Dyer, was appointed his administrator. The corn was shucked and in pens at the death of the intestate to enable him to comply with his agreement, and when the appellee administered he delivered the corn and received the balance of the purchase price, with which he has charged himself as administrator.

The appellee finding that liens had been asserted by certain creditors on portions of the estate of his intestate, filed a petition in equity asking for an ascertainment of the liens and a reference to the commissioner for the purpose of auditing his accounts and settling the estate. An amended petition was also filed in which the insolvency of the estate is alleged by reason of the numerous claims that are being presented, and the chancellor is called upon to settle it as an insolvent estate. The petition and amendment were both filed after the corn had been delivered to the vendees by the administrator. The appellants, who were creditors, filed answers as well as exceptions to the commissioner's report by which they seek to make the administrator liable for delivering the corn, insisting that the purchasers, Buckham & Field, were not entitled to the corn, and could only recover the amount of money advanced on the purchase; that as to this money they occupied the position of a general creditor. If by the terms of the contract the title passed to the corn at the time of the sale, then the creditors can assert no claim as against the administrator, but, without discussing this question, it seems to us the personal representative should not be held responsible.

The particular corn delivered was the object of the agreement between the parties. It had been placed in pens ready for delivery, and the sum of \$2,288.26 advanced upon it by the purchasers. It was a contract the violation of which subjected the estate of the intestate to damages, and it was with the personal representative, under the commissioner's terms, to determine whether he would comply with the terms of sale by delivering the corn or refuse to do so, and thereby make the

estate liable not only for the money advanced upon it, but for such damages as the purchaser would be entitled to recover for the breach of the agreement.

It was certainly not such a fixed or ascertained liability as that of an ordinary debt, but involved the question only as to whether the personal representative would comply with the agreement or subject the estate to damages. If corn had advanced a dollar on the barrel the creditor might then have been heard to complain of the failure of the administrator to execute the contract of his intestate. It is evident the appellee was not aware of the insolvency of the estate at the time he delivered the corn, and the only question really involved is, did the administrator act in good faith when executing the contract? This is not an ordinary demand such as is contemplated by the statute, that when discharged it must be done at the risk of the personal representative, so far as the estate is concerned.

It not only involved the payment of the moneys advanced, but damages for the nondelivery of the property purchased, and the administrator, exercising a discretion as to his duty, complied with the terms of the contract and relieved the estate from a litigation that must have resulted in the assessment of damages against it, as well as a recovery of the principal sum advanced. He may have supposed that the title passed to the vendee, as is insisted by his counsel in argument here, but whether he did or not, his action was within the range of a discretion he had the right to exercise, and the creditors should not complain. An administrator is entitled to the presumption of good faith in the discharge of such duties as are not defined by statute like any other trustee. Section 88 of chapter 89, General Statutes, was not intended to compel the administrator to submit to an action for damages for the purpose of settling such unliquidated demands as this, but it is his duty to do that which, in the exercise of a proper discretion, he thinks best for the interest of the estate.

Under the ancient rule, with reference to the payment of debts, the liability of the administrator depended principally upon his good faith and vigilance in ascertaining their justice, and in equity, when the personal representative acted in good

faith and paid debts or claims where there was a deficiency of assets, he was entitled to relief. (Story's Equity Jurisprudence, volume 1, page 95; 3 Dana, 41.)

While the relief in such cases is now regulated by statute, it by no means follows that in the class of cases before us all discretion is withheld from the personal representative, and he is compelled to submit to the costs of expensive litigation in order to settle that which, as a prudent business man, he could determine without involving the estate in costs. The damages in this case may, and doubtless under the proof would, not have been heavy against the estate, but this court will not speculate on such a result, and when the administrator in good faith has complied with a contract made by his intestate for the delivery of property that had been paid for, and the breach of which would have resulted in damages and costs against his estate, the chancellor will not hold the personal representative responsible when the entire proceeding shows that he acted in the best of faith. The claim of Ames' executor was properly disregarded, the corn had been removed from the rented premises for several months, and the lien as to the creditors was gone.

The judgment below in each case is affirmed.

Spalding & Spalding for appellants.

C. C. Rose and C. Bennett for appellee.

MADISON COUNTY COURT v. RICHMOND, IRVINE & THREE FORKS RAILROAD.

(Filed January 19, 1882.)

1. Subscription for stock in railroad company by county court was valid, and binding on the county in this case.

2. Proposition submitted to the voters of the county to subscribe for stock, upon certain conditions precedent, was authorized by the charter.

3. "When the vote is taken upon a proposition to aid a railroad the officers whose duty it is to make the subscription and issue the bonds must follow the provisions of the proposition accepted by the people."

Such officers can not alter or change the terms or conditions specified in the proposition submitted to the vote.

A second submission, upon different terms and conditions, had no effect upon the acceptance of the proposition on the first submission in this case, or upon its validity.

4. Whether the conditions precedent, upon which the vote of the county authorized the subscription to be made, had been complied with or performed within a reasonable time is a question discussed and decided herein.

Delay of four years in making the subscription under the circumstances in this case did not invalidate it.

5. Bonds bearing less rate of interest than specified in the proposition submitted to the vote are valid.

"If the bonds be issued with the consent of the company, bearing a less rate of interest than 8 per cent., that fact would not invalidate the bonds, because it would be beneficial to the obligors, and can be accomplished without increasing their responsibility or prejudicing their rights."

Appeal from Madison Common Pleas Court.

Opinion of the court by Judge Hargis.

By an act of the legislature, passed February 28, 1873, the Richmond, Irvine & Three Forks Railroad Co. was incorporated.

Section 15 of the act provided that whenever the president and directors of the company shall, in writing, request the county court of any county through or adjacent to which it is proposed to construct its railway to do so, such court may submit to the qualified voters of such county the question whether said court shall subscribe to the capital stock of the company for and in behalf of the county the amount of stock specified in the request of the company, either absolutely or upon such terms and conditions as may be proposed by the company.

It also prescribed the time and manner of holding the elections which might be ordered.

After specifying by whom and how the result of the elections should be returned and the vote counted, section 16 uses the following language:

"And if it shall appear that a majority of those voting voted in favor of the subscription of the stock proposed, the county judge shall order the vote to be entered of record and the subscription to be made by the clerk for and on behalf of the county * * * thus voting, and on the terms specified in the order submitting the question to a vote." The president and directors of the company filed their petition in the Madison County Court, and pursuant to their request the court ordered an election to be held on the 25th of November, 1876, to take the sense of the qualified voters of the county on the pro-

priety of subscribing, subject to certain conditions, \$250,000 to the capital stock of the company, and an additional sum sufficient to pay for the right of way and depot grounds to be located in Madison county.

It is not seriously questioned that the election was advertised and regularly held by the officers named in the order; that the pool books were returned and votes counted and certified in conformity to the charter of the company, and that a majority of the qualified voters of Madison county voting at the election voted in favor of the subscription, with the conditions named in the order under which the election was so held.

After a careful analysis of the case before us we have considered that three general propositions present themselves for our decision:

1st. Is the order, with its conditions, of the county court submitting the proposition to the voters of Madison county authorized by the company's charter and the amendments thereto?

2d. Has the county judge the authority under the charter, with or without the directions of the county court, to order the subscription to be made by the clerk on the terms specified in the order submitting the question to a vote?

If these propositions be decided in the affirmative, has the company performed the conditions precedent within a reasonable time, and had the county judge authority to hear proof and decide on that question?

The last proposition involves the effect of the judgment rendered in the common pleas court upon the same issues therein adjudicated, and were again urged in the agreed case subsequently submitted to the circuit court.

The determination of the first proposition will have been reached after a corrected disposition of the second condition annexed to the order submitting the proposition to subscribe to a vote.

That condition is as follows:

"It is further conditioned that no subscription in behalf of Madison county shall be made or binding upon the county until a sum in the aggregate, including the sum to be sub-

scribed by this county, shall have been subscribed in a valid manner and bona fide to the capital stock of the company for the purpose of constructing said railway, by solvent persons, counties or corporations, amply sufficient to construct said railway from Richmond, Ky., to Beattyville, Lee county, Ky., without any indebtedness or mortgage of any kind existing at the time of its completion and until satisfactory proof shall have been presented to the county judge by said company that such subscription has been made as aforesaid, and upon such proof being made it shall be the duty of the county judge to enter an order of record directing the clerk to make the subscription for and in behalf of the county in conformity to all the conditions and provisions made in said order, provided the other conditions precedent to the making of the subscription shall have been complied with by the railroad company."

The authority for imposing this condition is found in the general provision of section 15 of the charter, wherein it is provided that the county court may submit the question to the voters of the county, whether said court shall subscribe, either absolutely or upon such terms and conditions as may be proposed by the company.

There is hardly room for argument on so plain a proposition.

The company was the judge of the character of the proposition it would propose to the voters, and the county court had the discretionary power, under this section, to submit or not to submit the question, as in the judgment of a majority of the court, composed of the judge and justices, might seem best, and the voters had the ultimate power of rejection or adoption.

But the company having proposed the terms and conditions of the contemplated subscription, the county court having made the order in harmony therewith, and the vote being taken in pursuance of the order which is authorized by the charter, the county court has no power to revoke its action, and thereby assume legislative functions.

The county court and county judge are the agents under the charter of the legislature, which may change, modify or enlarge their powers and control and direct their action in carrying out any legitimate legislative purpose expressed in the charter.

This position is sustained by the text on page 258 of Burroughs on "Public Securities," where it is said:

"When the vote is taken upon a proposition to aid a railroad the officers whose duty it is to make the subscription and issue bonds must follow the provisions of the proposition accepted by the people.

"They can not alter them in any matter of substance, nor can the municipal authorities, such as the council of the city, change the terms of aid or alter the conditions upon which it is given. Even the people themselves can not, by a second vote, change the terms of the first submission." (Town of Plattville v. Galena, 48 Wis., 48; Hodgman v. Chicago & St. Paul R. R. Co., 20 Minn., 48.)

It is true that section 15 uses this language, "whether said court shall subscribe," but it is also true that section 16 provides that if it shall appear that a majority of those voting voted in favor of the subscription of the stock proposed the county judge shall order the subscription to be made by the clerk on the terms specified in order submitting the question to a vote.

From a superficial view it might be inferred that these sections conflict, but construed in connection with each other they readily harmonize and evince the purpose on the part of the legislature to afford an easy and safe mode of making the subscription by a responsible official whom the county court had the power to require to hear proof of performance by the company of the conditions precedent.

It is true that the county court might have reserved to itself the right to hear the proof and decide upon its sufficiency, but it did not do so, and we are unable to find in the charter that such power is delegated to the county court, to be exercised by it exclusively.

The general power confided to the county court, to require conditions to be annexed to propositions of the company before submitting them to a vote, and the command of section 16 to the county judge, that he shall order the subscription to be made by the clerk on the terms specified in the order submitting the question, precludes all doubt of the power of the county court to specify as part of the terms or conditions of

its order that the county judge shall hear proof of performance of the conditions imposed upon the company before he shall order the subscription to be made.

According to our construction of section 16 the county court had the alternative power of hearing the proof or annexing a condition to the subscription that the county judge should hear it, or it might have submitted the proposition, without any such condition as No. 2, above quoted, and then it would have been the duty of the county judge to order the subscription to be made on the remaining conditions, and such a subscription would have been conditional, but, nevertheless, a subscription subject to defeat by failure upon the part of the company to comply with the conditions.

The charter does not specify what particular conditions the county court may embrace in the order submitting the proposition of the company to a vote, the propriety and necessity of the conditions belong to the discretion of the county court, but that discretion must be exercised before the vote shall be taken, as thereafter nothing is left to the county court, county judge or county clerk, but pursuit of the statute, and strict obedience to its requirements.

The county court had, therefore, the power to impose the conditions.

The majority of the electors cast their votes in favor of the proposition as conditioned, thus creating the jurisdictional fact and foundation for the action of the county judge, who was bound to respect the terms and conditions specified in the order of the county court submitting the question to a vote, and in ordering the subscription to be made by the clerk.

And an essential part of the terms specified in the order of the county court was that upon proof being presented to the county judge that the additional subscriptions named in condition 2 had been obtained, and that the other conditions precedent had been complied with, he should order the subscription to be made by the clerk.

This the county judge has done, and his action is conclusive unless fraud or bad faith or a wilful perversion of the proof be shown upon the part of himself or the company, and no taint

or suspicion of unfairness in his or the company's action is even suggested.

If he has honestly, though erroneously, judged as to the sufficiency of the proof, and the county court might have been less liable to mistake, yet this question being one about which the judgment of the county court or the county judge had to be invoked and trusted, and the county court having yielded or shifted this responsibility to the county judge, who was authorized by the charter to exercise it, we can perceive no reason for disturbing his action.

But the breadth of this proposition is not required to sustain it, as the agreed facts concede that the proof of all the conditions necessary to his action was sufficient.

Having disposed of the first proposition very little need be said upon the second.

By the express provisions of section 16 the county judge is authorized to order the subscription on no other terms than those prescribed by the county court and voted on by the people. If there had been annexed to the proposition conditions which made no reference to the county judge or his duties, upon a favorable vote being had, without directions from the county court, it would have been the duty of the county judge to order the subscription to be made on the terms specified in such proposition and its conditions.

But it seems, in order to guard against making a conditional subscription, the county court determined to convert what was apparently a conditional subscription as voted upon into an absolute subscription by requiring proof to be produced to the county judge that all the conditions precedent had been complied with before he should order the subscription to be made.

Requiring proof that the conditions precedent had been performed only added strength to the propriety of an act the county judge had the power to perform, and which was his duty to do, even if the county court had imposed conditions that such proof should be heard by it, as in all cases, whether the proposition be absolute or conditional, it is the duty of the county judge upon ascertaining, by the mode pointed out in the charter, that a majority of those voting had voted in favor

of the subscription, to order it to be made by the clerk on the terms specified in the order submitting the question to a vote.

The county court and county judge are as much bound as the company to conform to the charter in exercising the delegated authority which the legislature has invested them with as its agents, and no departure from its terms can be indulged by any of them.

Hence the order of revocation made by the county court and the second election were ineffecutal to alter the terms on which the vote was first taken.

A legal submission to the election, their approval and compliance by the company, with the conditions of the proposed subscription, constitute all the necessary preliminary facts to a valid subscription by the county clerk, made in obedience to the order of the county judge.

The authority conferred upon the county court and county judge by the charter under consideration is much broader and very different from the powers considered in the cases of the *Mercer and Garrard County Courts v. Kentucky River Navigation*, 8 Bush, 897.

Then the act conferred upon the justices composing the county courts authority which was purely personal, and the agent who made the subscription acted out of court, with no warrant of law for his appointment or action.

This reference, with what has gone before in this opinion, manifests the distinction between the cases.

Even if the company and its agents, pending the consideration of the proposition by the people before the election, represented to them that their favorable vote would enable the company to procure subscriptions from cities, counties and other corporations, yet it appears from the proposition and the conditions on which the people voted that they did not rely upon such representations, because they guarded themselves as subscribers from responsibility which might accrue, notwithstanding the company could not comply with the alleged representations, by requiring it not only to procure such additional subscriptions from cities, counties and other corporations, but

to adduce proof thereof to the county judge before the subscription should be made or binding upon the county.

It can not be that people securely guard themselves against misrepresentation and even against an honest mistake of judgment, and then become influenced by the representations which they have rendered harmless, even if these representations turn out to be false.

The object of the county court seems to have been to secure the people from loss which might result from an abortive effort to build the road.

And if the conditions imposed by it are complied with, and we have no ground to doubt that fact as it is agreed the proof before the county judge shows the performance of the conditions precedent by the company, there can be no possible danger of the subscription of the county being squandered.

Considering all the circumstances of this case we do not think that the time, merely within which the road should be built, was the leading or essential element that governed the voters in casting their ballots for the subscription, as no time was specified in any of the conditions within which the additional subscriptions should be obtained, and doubtless it was left out of the order of submission for fear it might defeat the great object which a majority of the county court and voters had in view.

In this state of case the law fixes a reasonable time as the period within which the conditions should be performed. What is reasonable time must depend upon the nature and extent of the thing to be done, and the character of the person who is to do it.

Many things involving information, skill, discretion and great labor are to be done before subscriptions can be obtained from cities and counties, as is aptly illustrated by the course and character of the cases we are now considering.

And in view of the efforts of the appellee to obtain other subscriptions and the obstacles which the county court has placed in its way, by attempting to impose limitations unauthorized by law, after a legal vote had been taken in favor of the subscription and the consumption of time necessary to a second election which the county court participated in secur-

ing, in order to modify the terms of subscription which had passed beyond its lawful power, we are not convinced that the mere lapse of four years, unconnected with any purposed delay, is an unreasonable length of time to indulge the company in obtaining the subscriptions prerequisite to a valid subscription by Madison county.

In the action in the common pleas court the identical question as to the unreasonable time which the appellee is alleged to have taken to obtain the additional subscriptions was raised and adjudicated on by that court.

And it furnishes a bar to the proceedings herein in so far as they are based upon that question. (*Aurora v. West*, 7 Wallace, 82; 2 Smith's Leading Cases, 7 Amer. Ed., 762 to 790; *Henderson v. Henderson*, 820 Hare, 115.)

By the provisions of the amendment of 23d February, 1876, section 8, it is the duty of the county court to issue the bonds for the subscription when proper application shall be made to it for that purpose, after the subscription to the capital stock shall have been made. This duty the county court performs by ordering the bonds to be issued and signed by the county judge and countersigned by the county clerk, except as to the coupons, which the clerk alone can be required to sign.

If the bonds be issued, with the consent of the company, bearing a less rate of interest than 8 per cent., that fact would not invalidate the bonds, because it would be beneficial to the obligors and can be accomplished without increasing their responsibility or prejudicing their rights.

The form, terms and purpose for which the bonds may be issued can not be altered, and if they be issued in conformity to the terms on which the people voted and in accordance with the charter in every other respect save the voluntary deduction or surrender of two per cent., or any amount of the interest, on the part of the company, the bonds so issued will be valid.

The judgment of the common pleas court sustaining the demurrer to the petition and the judgment on the agreed facts by the circuit court must, for the reasons given, be affirmed.

T. J. Scott for appellant.

J. B. McCreary, W. B. Smith, C. F. & A. R. Burnam and C. H. Breck for appellee.

REDMAN v. BEDFORD.

(Filed January 19, 1882.)

1. Rents in case of death of life tenant, whether payable in money or in a proportion of the crop raised on the shares on the land, should be apportioned between the remainderman and the representative of the life tenant.

2. The relation of landlord and tenant existed in this case wherein the owner of a life estate in land rented to or permitted another to cultivate a field in wheat on shares, each furnishing one-half of the seed, the latter sowing, cutting and paying for the threshing of the same, one-half of the crop to be delivered to the landlord at the machine.

Appeal from Bourbon Circuit Court.

Opinion of the court by Judge Pryor.

Redman died in June, 1879. He held an estate for life in a tract of land in the county of Bourbon with the remainder vested in his children. Preceding his death and for that year he rented to or permitted one Tate to cultivate a field in wheat on shares, Redman to furnish half the seed wheat and Tate the other half. Tate was to sow, cultivate and cut the wheat, pay for threshing and give to Redman one-half the crop after it was threshed, to be delivered at the machine. Nothing was said about the time of renting. Tate, with his teams, put in and harvested the crop, and when the wheat was ready to be delivered Bedford, the appellee, who had administered on the goods of Redman, took one-half of the wheat, and this controversy is between Bedford and the heirs or children of the decedent, the latter claiming an interest in the crop or a part of the rent. We think the appellants were entitled to recover, and that the relation of landlord and tenant existed between the life tenant and Tate. The first section of article 5 of chapter 66, General Statutes, provides that when contracts are made by which the landlord is to secure a portion of the crop as compensation for the use and rent of the land the rights of the landlord shall be protected even against an innocent purchaser so long as the crop remains on the land, although severed from it, but does not apply to an innocent purchaser without notice after its removal for twenty days from the rented premises on which it is planted. The use of land under like contract is common within the State, and it is evident from the February, 1882—3

provision of the statute referred to that the relation of landlord and tenant exists in such cases, although no defined term is to be found in the contract between the parties, nor did the renting terminate at the death of the life tenant (Section 29 of chapter 32, General Statutes). The tenant has the right to the exclusive use of the land for the purposes of planting, maturing and harvesting his crop and could maintain trespass for an unlawful entry upon it. Section 30 of article 2 of chapter 39, General Statutes, provides: "When a person who has a freehold or an uncertain interest in land shall rent out the land and die before the rent becomes due, the rent of the land shall be apportioned between the personal representatives of the deceased and the person who shall succeed to the land as heir, personal representative, devisee or person in reversion or remainder, unless in the case of a devisee the will shall otherwise direct." Neither section 27 nor 28 apply to a case of renting, nor do we mean to adjudge that they apply to the case of a life tenant. It is not necessary to decide that question. After deducting the value of the wheat furnished by the life tenant for sowing the ground, the balance of the rent should be apportioned between the remainderman and the representative of the life tenant.

Judgment reversed and cause remanded for further proceedings consistent with this opinion.

Brent & McMillan for appellant.

Chas. Offutt for appellees.

BRAMEL v. CUNNINGHAM, BY, &c.

(Filed January 10, 1882—Not to be reported.)

1. Prosecution of suit for infant by next friend after the arrival of the infant at full age—right to object thereto may be waived.

"The defendant having filed his answer and gone to trial without excepting, it is now too late to object that the action was prosecuted by her next friend after she arrived at full age, or that he (the next friend) failed to show his right to sue as required by section 37, Civil Code."

2. Unless the verdict is flagrantly contrary to the evidence the Court of Appeals will not reverse the decision of the lower court as contrary to the weight of the evidence.

3. Evidence irrelevant to the issue was properly excluded in this case.

4. Error not prejudicial to the substantial rights of the appellant will not authorize a reversal.

Appeal from Mason Circuit Court.

Opinion of the court by Chief Justice Lewis.

The verdict of the jury and judgment of the court having been rendered against the defendant in this action for the sum of \$400, he has appealed to this court and assigned various errors, which will be considered in their order:

1st. Appellee, Emma Cunningham, being an infant under twenty-one years of age when the action was brought, had the right to sue by her next friend. And the defendant having filed his answer and gone to trial without excepting, it is now too late to object that the action was prosecuted by her next friend after she arrived at full age, or that he failed to show his right to sue as required by section 37, Civil Code.

2d. In this case the plaintiff, Emma, testifies positively and distinctly to the truth of the allegations of the petition, and though the defendant, with equal distinctness and emphasis, testifies to the contrary, and some facts are found tending to contradict her statement and corroborate his, still, as the jury is made the triers of the facts and the judges of the credibility of the witnesses, this court is not authorized to set aside the verdict because not able to say it is palpably against the weight of the testimony.

3d. Considering the character of the assault alleged to have been committed, the condition and relation of the parties at the time, and the estimate usually and properly put upon female chastity, we are not prepared to say the damages in this case are excessive, appearing to have been given under the influence of passion or prejudice.

4th. As appellee, Emma, does not appear to have been a party to, or in any way connected with, the difficulty between appellant and her brother Jacob, we are of the opinion the testimony of appellant in regard to it was properly excluded.

5th. We perceive no error in the instructions given by the court at the instance of the plaintiffs, except that the word "wrongfully" is improperly used in the first instruction. But to that appellant can not object because it was prejudicial, not

to him but to appellee. The court instructed the jury to find for the plaintiff in case they believed appellant assaulted her in the manner alleged in the petition. To this mode of calling the attention of the jury to the issue made by the pleadings we see no objection. As to the second instruction it was given in the usual and proper language, and did not prejudice the substantial right of appellant.

Whereupon the judgment is affirmed.

Wadsworth & Son for appellant.

I. C. Campbell for appellees.

PERKINS v. FISHER.

(Filed January 14, 1882.)

Discharge in bankruptcy of a member of a firm on his individual petition, and without any proceedings by or against the firm, does not release the bankrupt from liability for his partnership debts.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Pryor.

The record in this case shows that the appellee was a member of two firms, one under the style of Wm. Fisher & Bro. and the other of Carter & Fisher. Carter & Fisher filed their petition in bankruptcy asking to be relieved from their firm liabilities of Carter & Fisher and their individual indebtedness. They obtained a discharge in the usual form from the firm and individual debts, and after this was done the appellant instituted this action on two bills of exchange accepted by the firm of Wm. Fisher & Bro. for several hundred dollars. The appellee pleaded his discharge in bankruptcy to which the appellant replied that it was a debt of the firm of Wm. Fisher & Bro., and that said firm never went into bankruptcy, but, on the contrary, had and owned assets that should be applied to the payment of the two bills, further averring that the bankrupt court took no jurisdiction of the firm assets of Wm. Fisher & Bro., nor were the claims of the creditors of that firm presented for payment or its assets distributed. There is no proof on this record that any such claim was presented or that the

assets of the firm of Wm. Fisher & Bro. were distributed among creditors, but, on the contrary, the facts all conduce to sustain the reply. The firm of Wm. Fisher & Bro. may be perfectly solvent and the firm of Carter & Fisher insolvent, and their individual assets insufficient to pay their individual debts. If this creditor of the firm of Wm. Fisher & Bro. had presented his claims for payment he certainly could have received nothing until the partnership creditors of Carter & Fisher had been satisfied, and in *Hudgens v. Lane*, 11 Nat. Bk. Register, —, it was decided that the discharge of a member of a firm on his individual petition in bankruptcy and without any proceeding of or against the firm does not release the bankrupt from the partnership debts.

Drumond, Judge, In re Noonan, 8 Biss., 491, says: "It is difficult to see how any member of the firm can be released from his personal liabilities as such without the court authoritatively looking into the transactions of the firm and settling up its affairs. A man can not be discharged from his liabilities as a member of the firm, unless the debts and assets of the firm are considered and adjudicated upon by the court. (*Cary v. Reny*, 67 Maine., —.)

In this case there is an attempt to show that these claims were presented and passed on by the bankrupt court, but there is no proof of this fact other than the explanation made by the appellant that he presented the claim and was told the court had no jurisdiction over the assets of Wm. Fisher & Bro. The appellant, from the facts before us, was entitled to a judgment. The judgment is reversed and cause remanded for further proceedings not inconsistent with this opinion.

Wier, Wier & Walker for appellant.

Geo. W. Jolly for appellee.

HOOD'S ADM'X v. HOOD'S DEVISEES.

(Filed January 26, 1882.)

Creditors who fail to appear and file their claims in an action by a personal representative to settle and distribute the estate of a decedent are not barred by such failure from bringing an action against any legatee or distributee within the time prescribed by section 434 of the Code.

But when a creditor is made a party to the action and served with process, and called upon to assert any claim he may have against the decedent, such creditor should be required to appear and present his claim or have it barred against legatees and distributees.

Appeal from Madison Common Pleas Court.

Opinion of the court by Judge Hargis.

Mrs. Hood having made her will and devised her estate to Mrs. Little and Mrs. Arnold, who were her only children, died leaving considerable real property, but little personal property, and some debts unpaid.

Mrs. Little was appointed administratrix, and brought this suit against Mrs. Arnold, her husband, James H. Arnold and one of the creditors of the decedent for the purpose of settling her accounts, paying the debts and dividing the estate in pursuance of the provisions of the will.

She alleged that the defendant, James H. Arnold, had a claim against the estate for goods amounting to some \$400.

The clerk made an order for the creditors to appear before the master and prove their claims before a certain day fixed in the order.

Mrs. Arnold answered the petition, making no reference to her husband's claim against the estate.

The master reported his settlement with the administratrix to the first term after the reference to him by the clerk. It appears by the report that the administratrix had paid Arnold's debt, which she referred to in her petition.

In vacation the administratrix filed an amended petition, alleging that Arnold was giving it out in speeches that he had a claim, evidenced by note, against the estate for \$9,000 or \$9,500, and that she knew nothing of its existence or genuineness, and asked that he be required to file the note so its genuineness and validity might be adjudicated and the estate finally and fully settled and properly divided between her and her sister, as its existence and nonsettlement would be a cloud upon her share of the realty after division.

On motion of Arnold and wife the amended petition was stricken from the files and the estate settled and division made

without reference to the supposed claim of Arnold, and the administratrix appeals.

Section 483 of the Civil Code provides that "creditors failing to appear and prove their claims, agreeably to such order, shall have no claim against the executor or administrator who has actually paid out the estate in expenses of administration, and to creditors, legatees or distributees."

And section 484 provides that legatees and distributees shall be liable to a direct action by a creditor to the extent of estate received by each of them, notwithstanding the failure of the creditor to appear and the discharge of the personal representative as prescribed in the preceding section."

These sections render the general proceeding to settle estates of deceased persons, as provided by chapter 18, title 10, Civil Code, inconclusive against any of the creditors who fail to appear and prove their claims, and the suit will furnish no bar to any future action of the creditor, brought within the period prescribed by said section 484, against legatees and distributees.

But we can perceive no reason why the creditors, when known and made parties to the action and served with process, shall not be compelled to answer definite allegations descriptive of their claims and either set up or abandon them against the estate.

And when devisees as well as creditors are made parties, as is done in this case, and one of the creditors holds a claim which, if allowed, would alter the division of the estate by giving one of the devisees more and the other less, such creditor should be required to present his claim or have it barred against legatees and distributees as well as against the representatives, as there should be an end of litigation, and multiplicity of actions avoided.

The amended petition filed in vacation by the administratrix was the proper mode of presenting an issue as to the claim of James H. Arnold, based on a note which he, as alleged, claims was given to him in order to equalize his wife with her sister, because of advancements made to Little and wife.

Wherefore, the judgment striking the amended petition from the files is reversed and cause remanded for further proper proceedings.

J. W. Caperton and W. B. Smith for appellant.

C. F. & A. R. Burnam for appellees.

BUNGER v. HART.

(Filed January 25, 1882—Not to be reported.)

1. A party loaning money at usurious rate of interest does not thereby forfeit all interest, but is entitled to recover judgment for the legal rate. (Johnson v. Utley, ante, page 238.)

2. It was not a clerical misprision, but was an error of the court to render judgment for more than the legal rate of interest in this action on a note bearing interest at the rate of 10 per cent., wherein the plaintiff prayed for judgment for his debt, interest and costs, and, therefore, because it was an error of the court to render the judgment for a greater than the legal rate of interest, it was not necessary for the defendant to move the lower court to modify or amend the judgment before appealing.

Appeal from Hardin Circuit Court.

Opinion of the court by Chief Justice Lewis.

It was not necessary that a motion in the court below to set aside or modify the judgment should have preceded this appeal, for section 763, Civil Code, does not apply in this case. The plaintiff having prayed for interest at the rate of 10 per cent., it was an error of the court and not a clerical misprision to adjudge it to him.

Counsel for appellant contend that as 8 per cent. per annum was the conventional rate of interest authorized by law at the date of the note sued on, and interest at the rate of 10 per cent. per annum was intentionally charged, the court below erred in failing to adjudge the whole interest forfeited. But this court, in the case of Johnson v. Utley, decided October 28, 1880, held otherwise, using the following language: "The forfeiture by the party loaning at a greater rate of interest than that provided by the General Statutes and the subsequent amendments was in the nature of a penalty, and when the section authorizing the forfeiture was repealed by the act of March 2, 1878, there was nothing to prevent the obligee from recovering

his debt with legal interest." According to the opinion delivered in that case, from which we see no reason to depart, appellee was entitled to judgment for his debt and interest at the rate of 6 per cent. per annum. But the court erred in giving him interest at the rate of 10 per cent., and for that reason the judgment must be reversed and cause remanded for further proceedings consistent with this opinion.

Montgomery & Marriott for appellant.

H. T. Nelson for appellee.

BEARD v. McKAY, &c.

(Filed January 26, 1882—Not to be reported.)

1. Sureties were not released by the bank, in which a note had been deposited as collateral security, accepting an order directing it to deliver the note to a certain person as soon as the note, for the payment of which it was pledged, was paid off.

2. Note bearing interest at greater than the legal rate will be held to be usurious in the absence of proof to the contrary.

3. It was a clerical misprision to render judgment for more than the legal rate of interest in this case, wherein the plaintiff prayed judgment only for the legal rate; and, therefore, because no motion was made in the court below to modify or vacate the judgment, it is affirmed.

Appeal from Hart Circuit Court.

Opinion of the court by Judge Pryor.

The demurrer to the answer was properly sustained. The note on Tobey was deposited with the bank as collateral security for the payment of the note on which the appellants were the sureties. McKay, the principal, gave an order to the bank to deliver the note to Ritchie as soon as the note sued on was paid off, the note upon which appellants are bound. We can not see how this prejudiced the sureties. The bank accepted the order with the conditions annexed. All parties were to have recognized the rights of the appellants as sureties, and, therefore, the right of the bank to deliver the note held as a collateral was restricted by the order. The note in controversy has not been paid nor has the note on Lowry been delivered to Ritchie. The acceptance of the order does not release the sureties and no ground for reversal exists for that reason,

nor can the judgment be reversed by reason of the usurious interest included in it. The note bears 8 per cent. interest, and two per cent. of that interest is usury or must be so treated in the absence of any proof to the contrary. The judgment should have been for 6 instead of 8 per cent. This, however, was a clerical misprision for the reason that the statement of the petition ignored the right to recover the usury, and only asked a judgment for the legal interest. This can be corrected in the court below by motion, as it was an oversight on the part, doubtless, of the judge or clerk. The petition did not ask for it, but, on the contrary, disclaimed the right to recover it.

Judgment affirmed.

Edwards & Seymour for appellant.

Woodson & Macey for appellees.

BELL v. KEACH.

(Filed January 28, 1882.)

1. Witness' statement that he was guessing at the amount of damages did not render his evidence incompetent.

2. Exemption from execution in favor of housekeepers.

"If a debtor is a housekeeper and has a family, composed of one or many persons besides himself, whom he is under a natural or legal obligation to support, and who are dependent upon him therefor, he is entitled to the benefit and protection of the exemption laws."

In this case the execution defendant was a "housekeeper with a family, consisting of a woman received and treated by him as his wife and his son by her."

3. Father of illegitimate child is under a natural and legal obligation to support him, and such child, when residing with him, should be treated as a member of his family.

4. Surety in indemnifying bond was not released by his suggestion, after he had signed the bond, that the constable might take his name therefrom. "as neither did he, in terms request, or the officer agree, to erase his name."

Appeal from Jefferson Common Pleas Court.

Opinion of the court by Chief Justice Lewis.

This is an action upon an indemnifying bond to recover damages for the seizure and sale under execution of property claimed by the owner to have been by law exempt.

The court below, in pursuance of special verdicts of the jury fixing the value of the property at \$100, and damages for the seizure and sale at \$290, rendered judgment for \$390.

The opinion of the witness as to the extent appellee was injured in respect to his crop by the seizure and sale, and which appellant moved to exclude from the jury for incompetency, was asked and given, after he had stated he was acquainted with the property and its value, and also with the condition and business of appellee. And though, upon cross-examination, he states he was guessing as to the amount of damages sustained, he manifestly intended, and was without doubt understood by the jury, to convey the idea simply that he, in his own language, "had not made an itemized account of the damages." The motion of appellant was, therefore, properly overruled.

Whether the court below erred in refusing the instructions asked by appellant, and giving others in lieu of them, depends upon the manner in which the two questions to which they relate, the main ones in this case, should be determined.

They are, first, whether appellee was, at the time of the seizure and sale, a bona fide housekeeper with a family within the meaning of the statute? Second, whether the indemnifying bond was so altered after being signed as to release the obligors or either of them?

The first question is of easy solution, because dependent upon simple tests.

If a debtor is a housekeeper and has a family, composed of one or many persons besides himself, whom he is under a natural or legal obligation to support, and who are dependent upon him therefor, he is entitled to the benefit and protection of the exemption laws. For, as said by this court in the case of *Brooks v. Collins*, 11 Bush, 622, "the evident purpose and meaning of the law making power in placing the exempted property beyond the reach of creditors was to enable the head of the household to provide for himself and his family, or those who are living with him and dependent upon him for a support."

The statement of appellee as a witness, which being uncontradicted must be taken as true, is that he had been a house-

keeper with a family for many years, and was so at the time his property was seized and sold by the officer; that his family then and now consisted of a woman who was his housekeeper, but to whom he had not been married until this action was brought; that said woman had been with him about twenty years passing for his wife, and is the mother of his son, a boy about nineteen years of age; and that the other members of his family were said son and hired hands who boarded with him while working on his place.

It thus appears that at the time of the levy and sale appellee was a housekeeper with a family, consisting of a woman received and treated by him as his wife, and his son by her, and that each were dependent upon him for support. And as it is manifest his purpose in keeping a household was to support himself, the woman and child, he must be regarded as a bona fide housekeeper with a family.

It may be true that appellee and the woman residing with him were living in adultery, and that he may not have strictly been under any natural or legal obligation to support her, and counsel for appellant contends that it would be against public policy as well as the spirit of the exemption laws to treat persons thus dwelling together as a family, entitled to the benefits of its salutary provisions.

But it is not necessary to decide how the exemption laws should be construed or administered if they alone were to be affected. For whatever may be their offenses, or the relation they sustained to each other, appellee was under a natural and legal obligation to support his infant son, though he may have been born out of wedlock, and so far from being against it is in accordance with the spirit of the law, as well as public policy, that he should be treated as a member of the family of appellee.

The instructions of the court being consistent with the foregoing views were properly given, and those asked by appellant not being so were properly refused.

The issue of fact as to the alteration of the indemnifying bond by the constable, after being signed by the obligors, was submitted to the jury, and by a special verdict they found it

was not so altered. It is, therefore, not necessary to decide whether the instruction of the court as to the legal effect of such alteration was or not proper.

The suggestion of appellant Cope after he had signed the bond, that the constable might take his name therefrom, for it amounted to no more than a suggestion, did not have the effect to release him from the obligation already incurred, especially as neither did he in terms request nor the officer agree, to erase his name. He remained bound jointly with the others who signed it.

The amount of damages fixed by the jury being sustained by the evidence, we are not authorized to say it appears to have been given under the influence of passion or prejudice, nor do we perceive any error of the court prejudicial to the rights of appellants.

The judgment is, therefore, affirmed.

M. A. & D. A. Sachs for appellant.

J. L. Clemmons for appellee.

STEPHENS v. MILLER, &c.

(Filed January 31, 1882.)

1. No appeal shall be taken from the judgment of a justice of the peace to the quarterly court in certain counties. (Section 4, act of March 20, 1876.)

2. An appeal bond is valid and enforceable against the principal and security therein, although the appeal actually taken from the judgment of a justice of the peace to the quarterly court was not authorized by law.

3. By taking an unauthorized appeal to the quarterly court the principal and surety in the appeal bond waived their right to object to the jurisdiction of that court and were estopped from denying the validity of the bond, as in such a case the bond is supported by a valuable consideration.

4. An appeal bond must be enforced by ordinary action and can not be enforced by summary proceedings, by notice and motion, under section 444 of the Code.

5. The substance of the common law embraced by the forms of action under our Civil Code must be the remedy resorted to to enforce statutory duties and liabilities when no specific remedy is provided.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Hargis.

Runner sued the Millers in the justices' court, and judgment having been rendered against him for costs he executed bond,

with appellant as surety, conditioned to perform the judgment of the court, and prosecuted an appeal to the quarterly court, where judgment was again rendered against him for costs.

After execution and return of "no property found" against Runner the appellees, upon notice and motion in the quarterly court, obtained judgment against the appellant as surety on the appeal bond for the amount of the unpaid judgment against Runner, the principal.

The appellant then appealed to the circuit court which rendered a like judgment against him, and he has appealed from that judgment to this court.

It is argued, first, that the judgment of the quarterly court was void, as it had no appellate jurisdiction over the judgment of the justice, and that the appeal bond is not, therefore, obligatory upon the appellant.

It is true that section 4 of the act of March 20, 1876, provides that no appeal shall be taken from the judgment of a justice of the peace to the quarterly court in certain counties, among which is Warren, yet the appellant executed the bond with the principal, whereby the latter obtained delay and obstructed the collection of the judgment against him without the consent of appellees and subjected them to the additional expense of a second trial, and thus a sufficient consideration to uphold the bond is manifested, and it is not void.

An analogous case is found in *Stevenson v. Miller*, 2 Littell, 306, in which this court held that a bond executed in order to obtain a void injunction was not, therefore, void, but was a good bond for the costs.

In *Hughes' Adm'r v. Hardesty*, the appeal was prosecuted directly to the circuit court from the justice's court under an unconstitutional law, yet the court held that the appellant waived his objection to the jurisdiction of the circuit court by failing to move to dismiss and consenting to a trial.

Here Runner actually sought the jurisdiction and also procured a trial in the quarterly court, which are much stronger facts to sustain a waiver of his objections to that court's jurisdiction than the mere failure of a party, who did not seek the jurisdiction, to object to it, and his consent to a hearing.

The quarterly court could have taken no cognizance of the appeal against the consent of the appellees and the concurrence of the appellant.

And we are of the opinion, whether the quarterly court had any appellate jurisdiction or not of the subject-matter, the conduct of the appellant and his principal estops them from denying the validity of the bond, supported as it is by a valuable consideration.

The second error assigned is in substance that the summary proceeding of notice and motion authorized by section 444 of Civil Code can not be resorted to as a remedy to enforce the rights of appellees growing out of the breach of the bond. In this we concur. Where duties and liabilities are statutory, and no specific remedy is provided for their enforcement, the substance of the common law embraced by the forms of action under our Civil Code must be the remedy resorted to. (3 J. J. Marshall, 878; 4 Bush, 608.)

By section 444 of the Code judgment may be obtained, on motion, "by a party or officer against a surety for costs," and it is contended by appellees that this provision authorizes the summary remedy by motion on an appeal bond.

It can not be denied that the agreement in the bond to satisfy and perform the judgment of the court embraces the costs of the action or special proceeding as well as the debt and interest; but this fact does not make it a "bond for costs" or an instrument by which security for costs, is evidenced, either in the sense of section 444 or chapter 1 of title 14, entitled "Security for Costs."

The fact that appeal bonds are for a distinct and much more important purpose than bonds which are given merely to secure the costs; and that the special provisions of a chapter of the Code, entitled "Security for Costs," refer alone to the latter class of bonds; and that the terms "a surety for costs" as used in section 444, *ibid*, so aptly relate to that chapter, leave but little room for speculation on the meaning of said section.

It does not embrace appeal bonds for the enforcement of which an ordinary action is the proper remedy, as there is no statute providing a different remedy on such instruments.

Therefore, the judgment is reversed and cause remanded with directions to dismiss the proceeding without prejudice.

H. J. Beauchamp for appellant.

J. M. Tyler for appellee.

GREGG v. WOODS.

(Filed January 21, 1882—Not to be reported.)

1. Two causes of action may be united—one for breach of warranty and the other for fraudulent concealment of unsoundness of the thing sold and warranted.

2. In action for breach of warranty, that a horse was gentle, safe and a good harness horse it was not necessary for plaintiff to show that defendant knew the horse was not such as he warranted him to be.

3. In action for fraudulent concealment of unsoundness it was not necessary, in order to recover damages, for the purchaser to have tendered the horse back or to have demanded a rescission of the contract.

4. Deposition of witness residing within twenty miles of the place where the court was held was properly excluded.

Appeal from Jessamine Circuit Court.

Opinion of the court by Chief Justice Lewis.

Two causes of action are stated in the original petition. The first is for an alleged breach of warranty that the horse sold was gentle, safe and a good harness horse. The second is for fraudulent concealment of alleged unsoundness of the horse.

To maintain the action upon the first ground it was not necessary for the plaintiff to show the defendant knew the horse was not such as he warranted him to be. Nor was it necessary, in order to recover damages upon the second ground, for him to have tendered the horse back and demanded a rescission of the contract. The court, therefore, erred not only in instructing the jury that these were necessary conditions of recovery by the plaintiff, but also erred to his prejudice by embodying in one what should have been given in separate and distinct instructions, whereby the plaintiff was deprived of any alternative right of recovery.

In the amended petition tendered by the plaintiff, and which the court refused to permit filed, it is alleged that the defendant sold the plaintiff the horse as sound and all right, and

warranted to him to be such, whereas he was at the time diseased and unsound in his eyes and otherwise, and by reason thereof he was of no value to him.

Though the cause of action stated in the amended petition is one arising upon contract and distinct from the one founded upon the alleged fraudulent concealment set forth in the original petition, still under section 88, Civil Code, as construed by this court, it may be properly united and prosecuted in the same action with that cause of action.

In the case of Jones' Ass'ee v. Johnson, 10 Bush, 659, this court used the following language: "Whenever the plaintiff has a cause of action upon a contract, and also a cause of action for fraud, or negligence directly connected with the contract, we have no doubt but he may unite them in the same petition."

While we do not say, because unnecessary, whether the court below abused a sound discretion or not in refusing to permit the amended petition filed at the time and under the circumstances it was offered, we are of the opinion the cause of action stated therein may be properly joined with those contained in the original petition. And when a new trial is had, if offered, the amended petition should be filed.

As the witness, Herr, resided within twenty miles from the place where the court that tried this case was held the exception to the reading of his deposition was properly sustained. He is not a practicing physician or surgeon in the meaning of section 554, Civil Code. But for the errors indicated the judgment of the court below must be reversed and cause remanded, with directions to set aside the verdict of the jury, grant to appellant a new trial, and for further proceedings consistent with this opinion.

Huston & Mulligan for appellant.

Geo. W. Darnall for appellee.

EPPERSON v. GRAVES.

(Filed January 21, 1882.)

1. A *fi. fa.*, when the office of sheriff is vacant, should be issued by the clerk of the circuit court to the coroner or jailer, unless those officers are interested, and, therefore, should not have been issued to the constable in this case.

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2. A constable to whom an execution was unlawfully issued, when it ought to have been issued to the coroner or jailer, by the clerk of the circuit court, is not liable as a trespasser for executing it.

3. When the constable received the execution, the office of sheriff being vacant, he "had no right to revise or question the decision of the clerk, or to inquire whether the coroner or jailer were interested or not," but it was his duty to proceed with it.

Appeal from Pulaski Circuit Court.

Judge Cofer delivered the following opinion January 14, 1880, after a rehearing it was again delivered by the court January 21, 1882:

The appellant being sued by the appellee for seizing and converting to his own use certain goods and chattels belonging to the appellee, sought in one paragraph of his answer to justify under the following facts:

He alleged that he was a duly elected and qualified constable of Pulaski county, and that there issued from the office of said county an execution of fieri facias against the appellee, and that he seized the goods sued for under and by virtue of said writ, and not otherwise.

The writ was directed to the sheriff or any constable, but he averred that the office of sheriff of Pulaski county was at the time vacant.

The appellee demurred to that part of the answer and his demurrer was sustained and judgment was rendered against the appellee for the agreed value of the property, and he has appealed.

Subsection 1 of section 667 of the Civil Code reads as follows: "Every process in an action or proceeding shall be directed to the sheriff of the county; or, if he be a party or be interested, to the coroner; or, if he be interested, to the jailer; or, if all these officers be interested, to any constable."

"The word 'process' means a writ or summons issued in the cause of judicial proceedings" (Subsection 26, section 732, Civil Code). And "the word 'writ' means an order or precept in writing, issued by a court, clerk or judicial officer." (Subsection 27, section 732.)

A fi. fa. is a writ, and, therefore, included in the generic word process used in section 667, and, when issued from the

clerk's office of the circuit court, is required to be directed as prescribed in that section; and, inasmuch as the office of sheriff was vacant, the fi. fa. under which the appellant seized and sold appellee's goods should have been directed to the coroner or jailer, unless those officers were interested, which does not appear.

But does it thence follow that the constable, to whom it was thus directed, is liable as a trespasser for having acted under it? We think not. The law made it the duty of the clerk to issue the writ, and to direct it to the proper officer. In order to do this he must first decide to which of the several officers it ought to be issued, and the constable, as a ministerial officer, had no right to revise or question the decision of the clerk, or to inquire whether the coroner and jailer were interested or not.

The writ was issued by an officer authorized to issue it, and to indicate which of several officers should execute it, and, being regular on its face, it was the appellant's duty to proceed with it. (*Commonwealth v. O'Cull*, 7 J. J. Mar., 150; *Banta v. Reynolds*, 3 B. Mon., 80.)

We are, therefore, of the opinion that the court erred in sustaining the demurrer to that part of the answer in which the appellant justified under the fi. fa.

Judgment reversed and cause remanded, with directions to overrule the demurrer.

Curd & Waddle for appellant.

T. Z. Morrow for appellee.

ROBERT v. BANNON, &c.

FITCH v. SAME.

(Filed January 21, 1882.)

1. Release of debtor by agreement of creditors to take 25 per cent. of their claims may be enforced by the creditors or by the debtor, and is enforced by the debtor in this case.

2. The agreement to release by one creditor is a sufficient consideration for the release of the others.

3. The right of the debtor to enforce such an agreement was not waived or lost by his making an assignment for the benefit of all of his creditors.

After making such an agreement the debtor had the right in good faith to sell or encumber or assign all his property, so as to protect himself and comply with his agreement with his creditors.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

The validity of agreements between creditors entered into for the purpose of releasing an insolvent debtor, when made in good faith, can not be questioned, and when the debtor has in this manner procured his release, and is willing and offers to comply with the terms of the agreement, there is no reason why it should not be enforced. The basis of settlement in this case was that 90 per cent. of the creditors for merchandise sold the debtor should sign the composition agreement. Perfect equality, unless otherwise agreed on, should exist between the creditors, the one having no advantage over the other. The execution of the agreement by one creditor is the inducement for the others to do likewise, all agreeing to relinquish their claims for a particular purpose, that is, to relieve the debtor from his insolvent condition, and the agreement to release by one is a sufficient consideration for the release by the other. The creditors are the parties contracting for the relief of the insolvent, and when the latter complies by paying or tendering the money, or whatever is required to release him from his obligation by the terms of the settlement, the creditor is bound to accept it. An agreement by the creditor with his debtor to take less than his debt, based on no other consideration than to relieve him from his pecuniary embarrassment, can not be enforced, but when the creditors enter into an agreement with each other that they will relieve the debtor by releasing a part of their demands, the agreement can be enforced even by the debtor, who can accept the terms fixed by his creditors and comply with the agreement. The creditors contracted with each other in this case to the effect that "they would accept 25 cents on a dollar, cash, in full settlement of our claims to date. This paper is not binding unless signed by creditors representing 90 per cent. of his merchandise indebtedness."

The creditors representing 90 per cent. of this indebtedness signed the agreement, and all of them have accepted the 25

cents on the dollar except the appellants. They say they are not bound by the agreement, because the appellee (the debtor) made an assignment of his property to a trustee for the benefit of his creditors after this composition agreement was entered into. This the appellee may have done for his own protection, or to bring about, if the composition agreement failed for want of the proper number of signatures, an equal distribution of his property or its proceeds between his creditors.

The proof conduces to show that one creditor at least had attached his goods, and to prevent such preference he made the assignment. There is no evidence of any fraud practiced by the appellee, but, on the contrary, he proceeded, after the assignment of his property, to obtain the requisite number of signatures in order to effect the settlement, and this having been done within a reasonable time, he proceeded to pay off his creditors under the agreement. He paid all but the two appellants, and they are now insisting that, as his estate is amply sufficient to pay them, the other creditors being satisfied, there is no reason for holding them to the agreement. It is argued that this is a controversy between the creditor and debtor only as all his other creditors are satisfied, and the debtor is able to pay them. The inquiry at once arises, what placed the debtor in a condition by which his ability to pay these two debts is unquestioned? The response is, the surrender by all of his creditors of their claims upon the payment of 25 cents on the dollar. The creditors' money is left with or given to the debtor by reason of the agreement the appellants are seeking to avoid.

The chancellor, in allowing these claims in full, would be aiding the appellants to take an improper advantage of those with whom they had in good faith contracted by using their means, or what, as between the appellants and the other creditors, belonged in law and equity to the latter, to pay appellant's debts. They knew of the assignment by the appellee, or, if not, they knew of the acceptance by the creditors, or many of them, of the sum agreed on in full discharge of their debts, and neither a court of law or conscience should give them this advantage.

They have no more right in equity to this money than if they had made a secret arrangement with the appellee to pay

their debts in full at the time they signed the agreement. The assignment of the estate of appellee for creditors did not change the relation of the parties. It placed the creditor in no worse condition, and even an absolute sale, if made in good faith, to enable the debtor to comply with the agreement, could not have been deemed fraudulent. It would be unjust to both the debtor and those of his creditors who had released their claims to permit this defense. The obligation to comply was reciprocal, and no creditor signing the paper can disregard his agreement so as to prevent the equitable adjustment, and the chancellor will not hesitate to enforce it. The debtor may refuse to comply or decline, by his acts, to recognize the agreement, and if so the creditor is not bound. We find no such refusal in this case. Judgment affirmed. (*Farmington v. Hayden*, 119 Mass., 454; *Peans v. Matthews*, MSS.)

Barrett & Brown for appellant.

Walter Evans, Alex. P. Humphrey and W. O. & J. L. Dodd for appellee.

HELM v. COFFEY.

Filed January 5, 1882—Not to be reported.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Hines, affirming.

1. Error not specified in grounds for new trial will not be considered on appeal.

2. Unless the verdict is flagrantly contrary to the evidence the Court of Appeals will not reverse the decision of the lower court as contrary to the weight of the evidence.

Geo. W. Jolly for appellant.

Owen & Ellis for appellee.

RAND, FOR, &c. v. DAVIS.

Filed January 5, 1882—Not to be reported.

Appeal from Lewis Circuit Court.

Opinion of the court by Chief Justice Lewis, affirming.

Assignee of a judgment, basing his action upon a written assignment, the existence of which is denied, must produce and file the writing, or show that it was lost, and could not be found after a reasonable search, before he will be entitled to recover.

Geo. T. Halbert for appellants.

KUEBORTH v. MEAD.

Filed January 7, 1882—Not to be reported.

Appeal from Greenup Circuit Court.

Opinion of the court by Judge Pryor, reversing.

Purchase of land at decretal sale, having agreed to permit the owner to redeem the land by paying him the amount of his bid, is entitled to 6 per cent. interest only on the amount of his bid.

Roe & Roe for appellant.

E. F. Dulin for appellee.

BRECKINRIDGE v. CARRICO.

Filed January 7, 1882—Not to be reported.

Appeal from Graves Circuit Court.

Opinion of the court by Chief Justice Lewis, affirming.

Party in possession of land sold at decretal sale is required to pay rent for the same, after sale and confirmation thereof, in this case. Held further—“Whatever may be the rule in respect to the relative rights and duties of purchasers at judicial sales and debtors or mortgagors, there is no reason in this case for permitting appellant to occupy and enjoy the land free of rent subsequent to the sale and confirmation, whether he was a part owner of the land or a mere intruder.”

Boone & Stanfield and W. W. Tice for appellant.

Anderson & Robertson for appellee.

BUCHANAN v. TRIMBLE.

Filed January 7, 1882—Not to be reported.

Appeal from Wolf Circuit Court.

Opinion of the court by Judge Pryor, reversing.

Stale claims are not enforced in this case.

The proof warrants the conclusion that the defendant had paid off the notes sued on in this case—the notes having been executed for land more than twenty years before the commencement of the suit, and, therefore, the judgment appealed from is reversed.

J. E. Cooper for appellant.

B. F. Day and J. M. Nesbitt for appellee.

CRUTHER, &c. v. SHELBY R. R. DISTRICT OF SHELBY COUNTY.

Filed January 7, 1882—Not to be reported.

Appeal from Shelby Circuit Court.

Opinion of the court by Chief Justice Lewis, affirming.

1. Change of election precincts by Shelby County Court in 1855, without the petition of a majority of the voters in each precinct affected by the change, having been acted upon and acquiesced in for more than twenty-five years, can not now be successfully objected to.

“No objection to the order, or attempt to vacate it, having been made by appellants or their vendor, but both having submitted to the change made by it and exercised franchises and rights under it without question or com-

plaint for more than twenty-five years, they can not now be heard for the first time to object to it."

2. When a boundary line is to be drawn between two given points it is to be a right line, passing from one point to the other by the nearest course.

John C. Cooper and L. A. Weakley for appellants.

Caldwell & Harwood for appellee.

JONES v. JONES, &c.

Filed January 10, 1882—Not to be reported

Appeal from Owen Circuit Court.

Opinion of the court by Chief Justice Lewis, reversing.

1. Widow has right to hold mansion house and curtilage until dower is assigned her, but she has no right to use or cultivate, free of rent, any other portion of the real estate.

2. She is not chargeable with the entire rental value of the land, except the mansion house and curtilage, but with only so much as she uses and cultivates.

Hallam & Gordon for appellant.

Geo. C. Drane for appellees.

ALLEN v. GRAVITT, &c.

Filed January 10, 1882—Not to be reported.

Appeal from Owen Circuit Court.

Opinion of the court by Judge Pryor, affirming.

Homestead and notes executed therefor can not be subjected by a creditor to the payment of his claim unless he can show a conversion of the notes or their proceeds into other species of property not exempted by law.

W. M. Beckner for appellant.

A. Duvall for appellees.

NEWMAN v. NEWMAN.

Filed January 14, 1882—Not to be reported.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Pryor, reversing.

An agreement in reference to the distribution of an estate is enforced between the distributees in this case.

Muir & Wickliffe for appellant.

J. W. Thomas, Geo. S. Fulton and John A. Fulton for appellee.

KAYE, &c. v. CITY OF LOUISVILLE.

Filed January 17, 1882—Not to be reported.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor, affirming.

Purchaser of lands at judicial sale in the city of Louisville being permitted by the court to retain the amount of taxes due the city and deduct the same from the purchase price, is required by judgment in this case to pay such taxes to said city.

D. M. Rodman for appellants.

H. M. Lane for appellee.

NATIONAL BANK OF STANFORD v. HOCKER, &c.

Filed January 17, 1882—Not to be reported.

Appeal from Lincoln Common Pleas Court.

Opinion of the court by Judge Pryor, affirming.

1. Accord and satisfaction—The delivery of one note in consideration of another is binding, and may be pleaded as an accord and satisfaction.

Written assignment of the note, however, is not necessary to make the plea valid.

2. An instruction given at the instance of a party can not be complained of by him as erroneous and ground for reversal.

J. S. & R. W. Hocker for appellant.

J. S. VanWinkle and R. C. Warren for appellees.

ÆTNA INSURANCE CO. v. STRICKLE, &c.

Filed January 19, 1882—Not to be reported.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Pryor, affirming.

1. Insufficient petition is cured by the answer in this case, wherein the petition, "to the effect that the plaintiff had complied fully with all conditions precedent on his part," is not only traversed by the answer, but that pleading designates the conditions dependent upon a recovery after the destruction of the property insured, and then by specific statements sets forth each and every condition and the failure of the plaintiff to comply with the same.

2. As to the alleged fraudulent misrepresentations of the value of the stock of goods insured and destroyed the jury were the sole triers in this case.

3. Where the proof on one side fixes the value of the goods insured at \$4,200 and on the other side at \$700 or \$800, it was the province of the jury to decide the one way or the other.

4. As to the alleged charge that the assured burned the property in order to obtain the insurance, it was the province of the jury to decide upon all the evidence bearing upon that question.

1st. "What was the value of the plaintiff's stock at the date of insurance?"

Answer. "\$4,200."

2d. "What was the value at the date of the fire?" Answer. "\$3,300."

3d. "Did plaintiff make full and complete proof of loss, as required by the terms of the policy, and furnish them to defendant sixty days before suit?" Answer. "Yes."

4th. "Did or not plaintiffs or either of them use all possible diligence, or any diligence, in saving or preserving the property insured?" Answer. "Yes."

5th. "Did sixty days elapse between the date of filing the last paper of their proof of loss and the filing of this suit?" Answer. "Yes."

As to the third interrogatory the court say: "It is insisted that the court should have told the jury what preliminary proof was necessary, and thus left them to decide whether or not this proof had been furnished. This may be true, but, as already stated, the defendant's own testimony shows that all the proof was furnished that the case was susceptible of, and, looking to the defendant's proof alone, it was sufficient. Their own agent knew the policy of \$2,000 was on the property, and had himself effected the insurance."

And in reference to all the interrogatories the court say:

"So if all the instructions had been refused, these plain, simple and easily understood issues, placed in the form of interrogatories, cured any and all defects in the instructions, and having been answered in the affirmative the general verdict necessarily followed."

Bush & Porter and Porter & Porter for appellant.

J. W. & Geo. R. Gorin and Halsell & Mitchell for appellees.

DODD v. HAYS, &c.

Filed January 21, 1882—Not to be reported.

Appeal from Warren Common Pleas Court.

Opinion of the court by Judge Pryor, affirming.

1. A writ of *habere facias* was equivalent to a judgment for the land in this action, wherein the petition for the recovery of the land was taken for confessed and damages assessed by a jury sworn to assess the same.

2. The question of title to the land was determined by the inquiry as to the damages, and the right of the plaintiff to the land was *res adjudicata*.

3. Petition for revivor in the name of the heirs of the plaintiff was informal as the revivor could have been made by motion on notice, but as the plaintiffs were required to pay the costs of the petition the defendants were not prejudiced thereby.

Halsell & Mitchell for appellant.

C. M. Thomas for appellees.

BURTON, &c. v. McFARLAND.

Filed January 24, 1882—Not to be reported.

Appeal from Davless Circuit Court.

Opinion of the court by Chief Justice Lewis, reversing.

Clerk was liable for failing to issue execution, to which the plaintiff was entitled by the terms of the judgment in this case, when ordered to do so by the plaintiff's attorney.

"The judgment appears to have been rendered in favor of only one of the plaintiffs, Burton, but that omission did not invalidate the judgment nor afford excuse for the failure of the clerk to issue the execution."

W. L. Burton and Little & Slack for appellants.

BRYANT STATION T. P. R. CO. v. JOHNSON.

Filed January 24, 1882—Not to be reported.

Appeal from Fayette Common Pleas Court.

Opinion of the court by Chief Justice Lewis, affirming.

1. Turnpike company is bound by act of March 19, 1878, fixing and reducing rates of tolls theretofore authorized to be charged.

Act of January 31, 1870, "for the benefit of the Bryant Station and Lexington Turnpike Road Co.," authorizing said company to charge rates of toll in excess of the rates prescribed by subsection 3, section 3, chapter 110, General Statutes, and the act approved March 19, 1878, is repealed by the latter statutes.

2. Said act of January 31, 1870, "was a mere gratuity, possessing none of the elements of a contract binding upon the Commonwealth," and, therefore, the legislature had the right to repeal it.

Huston & Mulligan for appellant.

BOYER v. LINCOLN, &c.

Filed January 24, 1882—Not to be reported.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Hines, reversing.

1. Personal judgment against discharged bankrupt, in an action to enforce a vendor's lien, was erroneous in this case.

2. Two personal judgments on same demand, the latter is erroneous.

In an action to enforce the payment of a personal judgment the court erred in rendering a second personal judgment against the defendant.

3. Mortgagor is not entitled to homestead right in land after the same has been sold under a decree enforcing the mortgage executed by him and his wife upon such homestead right.

4. Return of an officer may be amended so as to conform to the truth, all parties in interest being before the court.

5. A levy created a lien, although the return failed to state that such levy was made subject to prior encumbrances, when such was the fact.

Edwards & Seymour for appellant.

W. P. Lincoln and Humphrey Marshall for appellees.

HARNED v. HARVEY & KEITH.

Filed January 24, 1882—Not to be reported.

Appeal from Breckinridge Circuit Court.

Opinion of the court by Judge Hines, affirming.

Assignment of errors must specify errors complained of or it will not be considered by the Court of Appeals. The assignment held to be insufficient in this case was as follows: "The defendant, Harned, comes now and assigns for errors, and excepts to the whole of the judgment rendered in this case."

James G. Haswell for appellant.

P. B. Muir for appellees.

CHICK v. RANDALL GRAIN SEPARATOR CO.

Filed January 24, 1882—Not to be reported.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Hargis, affirming.

1. Whether an election to the secretaryship of a corporation was legal is a question of law.

"It is alleged in the petition that appellant was, at his own instance, elected secretary of the company, but refused to perform the duties of his office. This he denies by averring in effect, that, if elected, he was not elected under a charter legally obtained, or by a company authorized by law. These allegations amount to a legal conclusion and do not put in issue the fact that appellant was, at his own instance, elected secretary of the company whose legal existence he questions."

2. Subscribers for stock in a corporation can not withdraw therefrom when the corporation has been legally organized, and he has participated in the election of officers after such organization.

John M. Porter for appellant.

Halsell & Mitchell for appellee.

PATTERSON v. MILLIONS' ADM'X, &c.

Filed January 24, 1882—Not to be reported.

Appeal from Madison Common Pleas Court.

Opinion of the court by Judge Hargis, affirming.

1. The Court of Appeals can reverse only for errors appearing in the record.

"As the record fails to show affirmatively the disability of appellant's wife, we can not presume she was an infant when the judgment was reversed or sale made."

2. The statutory guardian in this case had the right to control the ward in taking and prosecuting this appeal, "as the interest of the ward does not conflict with the action of guardian."

John G. Cole for appellant.

C. J. Bronston for appellees.

EDMONSON v. GREEN, &c.

Filed January 24, 1882—Not to be reported.

Appeal from Washington Circuit Court.

Opinion of the court by Judge Pryor, affirming.

1. Homestead may be subjected to the payment of a debt incurred prior to the passage of the homestead law.

2. But proof in such cases must be clear and conclusive before the homestead can be subjected.

W. B. Harrison for appellant.

John W. Lewis for appellees.

JENKINS v. NETHERLAND, &c.

Filed January 24, 1882—Not to be reported.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Pryor, affirming.

Mistake must be alleged—A deed will not be cancelled for a mistake when the petition fails to allege that a mistake was made, and merely asks that the deed be cancelled because of a want of consideration.

The grantor had a life estate in the property which he conveyed in this case to another by a deed purporting to pass an absolute title. The plaintiff asked that the deed be cancelled because of a want of consideration. Held—That there was a consideration, and that the deed can not be cancelled because of mistake, in the absence of an allegation that a mistake was made.

R. E. Puryear and P. W. Hardin for appellant.

R. S. Montague for appellees.

SMITH v. GOWDY'S ADM'R.

Filed January 24, 1882—Not to be reported.

Appeal from Taylor Circuit Court.

Opinion of the court by Judge Pryor, reversing.

1. Homestead is subject to the payment of a lien for the purchase money.

2. A discharge in bankruptcy in this case did not prevent the enforcement of the lien on the homestead for the payment of the purchase money, although releasing all personal liability.

Beldin & Collins for appellant.

W. E. & S. A. Russell for appellee.

BANTA v. KENTON, &c.

Filed January 26, 1882—Not to be reported.

Appeal from Robertson Circuit Court.

Opinion of the court by Chief Justice Lewis, reversing.

The judgment in this case is reversed because the master commissioner failed to make proper report on matters submitted to him.

W. P. Ross for appellant.

ANDERSON, &c. v. GAITSKILL.

Filed January 26, 1882—Not to be reported.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Pryor, reversing and affirming.

1. Promise to pay note sued on must be alleged.

2. Lien securing alleged renewal note must be sufficiently set out in the petition to enforce it.

Judgments are reversed in this case because "there is no allegation of any promise on the part of the makers of the notes to pay the payees, nor is there any averment on the part of the Farmers Bank that the notes, for the payment of which a lien is retained in the deed from J. J. Anderson to Howard, were the renewals of the note for which Anderson was originally liable."

3. Bond for costs was properly not required of the bank as the bank was brought into the case by reason of its interest in the subject-matter of the controversy.

J. J. Cornellison and Wm. Lindsay for appellants.

Reid & Stone, C. Brock and B. J. Peters for appellee.

DAVIS' ASS'EE v. SMALLGOOD.

Filed January 26, 1882—Not to be reported.

Appeal from Union Common Pleas Court.

Opinion of the court by Judge Hargis, affirming.

1. State courts judicially know nothing of proceedings in bankruptcy except as pleaded and shown by the record.

2. Sale by one sheriff and the deed executed by another sheriff subsequently elected are held to be valid in this case.

3. The fact that the appraiser was the deputy of the sheriff who was executing the *fi. fa.*, is not cause for reversal.

Thos. E. Ward for appellant.

Hughes & Givens and A. Duvall for appellee.

GREER v. M. M. SAVINGS ASS'ON OF NEWPORT.

Filed January 26, 1882—Not to be reported.

Appeal from Kenton Chancery Court.

Opinion of the court by Chief Justice Lewis, affirming.

Purchaser at decretal sale failing to sue out injunction or to deposit the amount of his sale bond in court had no right to retain the money until another suit was decided, and, therefore, was properly ruled to pay the same into court in this case.

R. D. Handy for appellant.

O. W. Root for appellee.

KUEBORTH v. PRATT.

Filed January 26, 1882—Not to be reported.

Appeal from Greenup Circuit Court.

Opinion of the court by Judge Pryor, affirming.

Amended answer and counterclaim filed after judgment was rendered and the land sold by the commissioner, without showing cause why it was not filed before, was properly rejected in this case.

Roe & Roe for appellant.

George T. Halbert for appellee.

ORME v. DAVID.

Filed January 28, 1882—Not to be reported.

Appeal from Union Circuit Court.

Opinion of the court by Chief Justice Lewis, affirming.

Assignee of a note on a bankrupt in an action against his assignor "must allege and prove that he prepared and presented his claim in bankruptcy at least within a reasonable time, in any event after the note became due, and on the first opportunity he legally had, after receiving actual notice of the bankruptcy."

Long & Allen for appellant.

Hughes & Givens for appellee.

STERMAN v. THORNTON, &c.

Filed January 28, 1882—Not to be reported.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Hargis, reversing.

1. Rescission of sale of a lot had the effect of cancelling the purchase note executed for it.

2. But by the re-delivery of the cancelled note, in part payment for another lot purchased from the payee by the obligors, a valid lien was created to secure such note on the lot last purchased.

Riley, Jolly & Walker for appellant.

ARVIN, &c. v. WELDEN, &c.

Filed January 31, 1882—Not to be reported.

Appeal from Henderson Circuit Court.

Opinion of the court by Chief Justice Lewis, reversing.

1. The plaintiff failed sufficiently to identify the property sought to be subjected to the payment of his debt.

2. It was in the sound discretion of the court to permit or refuse the exhibits to be filed in this case, but as such exhibits were allowed to be filed the court below erred in refusing to allow them to be read.

S. S. Sizemore for appellants.

M. Merritt for appellees.

CROFOOT'S EX'OR v. DUVALL (2 Cases).

Filed January 31, 1882—Not to be reported.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor, reversing.

1. Devise that certain funds be invested and the interest thereon paid over by the executor to the testator's daughter during her life, and to be equally divided between her children living at her death, "but should my said daughter die without leaving children or child, * * * then I will and bequeath said stocks," etc., to my sister, Mrs. Green, is construed as follows:

1st. Upon the death of the testator's daughter leaving an only child, an infant, that child became entitled to the full benefit of the devise, to go to the testator's sister if such child should die under twenty-one years of age without issue.

2d. That the guardian of such child is entitled to the possession of the funds.

3. A devise of real estate to one person, with remainder over to another in the event the first taker dies under twenty-one years of age, creates a defeasible fee in the first taker. Such first taker, an infant, is entitled to the possession by its guardian in this case.

3. A division or sale of such an estate should not be made when not necessary.

4. Costs of proceeding, to secure a judicial construction of a will, should be paid out of the estate, and not be adjudged against the executor.

Elliott & Hemmingray for appellant.

Lane & Harrison and Bijur & Davie for appellee.

BOOK NOTICES.

The Law of Corporations, compiled by Charles T. Boone, LL. B., and published by Sumner Whitney & Co., of San Francisco, has been received by us.

From the examination we have given it the book seems to be chiefly valuable for its essentially practical method and purposes.

The principles of the law applicable to corporations are concisely stated, the text supported by numerous citations, and the whole subject presented in chapters and paragraphs judiciously and systematically arranged.

The aim of the author "to present to the profession a full view of the law of corporations, as now determined by the leading courts of England and the United States, in as brief a space as is consistent with accuracy and clearness of statement," has apparently been very successfully accomplished.

Oddities of the Law—Messrs. Soule & Bugbee, of Boston, publishers, have presented us with an excellent book published by them, entitled "Oddities of the Law," by Franklin Fiske Heard, the author of several works on legal subjects.

The book consists of anecdotes of great lawyers and jurists, curious selections from the works of writers upon law, excerpts from reported decisions, selected with felicitous taste, and arranged with admirable diversity.

Such books are not only interesting, but instructing, and excite not only our laughter, but our thought. They relax the mind while extending the

information; and by familiarizing us with the lives and characters of the great men of the legal profession, arouse a deeper interest in the study of the law itself. If we are intimately acquainted with a judge, a personal interest attaches to any opinion he may render; and, by a similar feeling, if we are intimately acquainted with the history of Hardwicke, Mansfield, Eldon, Marshall, Story or Kent, we will read and study with greater pleasure, and consequently with greater profit, whatever has been produced by them in the records of jurisprudence.

We thank the publishers for having sent us so excellent a book.

We have received the report of the Fourth Annual Meeting of the American Bar Association, held at Saratoga Springs, New York, August 17, 18, 19, 1881, printed by E. C. Markey & Son, Philadelphia.

It is composed of the general minutes of the meeting, the constitution and by-laws, obituary notices of deceased members, and address by Edward J. Phelps, President of the Association, on "The Noteworthy Changes in Statute Law since the Last meeting;" The annual Address by Clarkson N. Potter, on "Roger Brook Taney;" a paper read by Thomas M. Cooley, on "The Recording Laws of the United States," paper read by Samuel Wagner on "The Advantages of a National Bankrupt Law," and letters from various gentlemen on the subject of "Legal Education" and admission to the bar in their respective States, written in answer to the circular of a committee appointed for the investigation of that subject.

The report contains much valuable matter, and the addresses and papers referred to are worthy of a more extended notice than we have the time to give.

The fifth annual meeting of the association will be held at Saratoga Springs, New York, on August 8, 9, 10 and 11, 1884.

THE KENTUCKY LAW REPORTER.

MARCH, 1882.

APPEALS FROM SATISFIED JUDGMENTS.

The Civil Code of Practice for Kentucky, which is similar to other codes on this subject, provides that "an appeal shall not stay proceedings on the judgment unless a supersedeas be issued"—that is, the party against whom the judgment is rendered can not prevent its execution by merely appealing. But the defendant in the judgment is not bound to supersede before he can exercise his right to appeal. He can satisfy the judgment and still appeal, or he can appeal without either satisfying or superseding the judgment. But suppose the judgment is in favor of the party who wishes to appeal? It is often the case that a party in whose favor a judgment is rendered prays an appeal, and asks a reversal on the ground that the lower court has erred in not giving him all that he claimed. Can he coerce or accept satisfaction of so much of the judgment as is favorable to him and still prosecute his appeal? This is a question that has not been passed upon in Kentucky, but has occupied much of the attention of the courts of other States. They have considered it in many different phases, all of which will be referred to in this article.

I apprehend it to be a principle well established that a party who has obtained judgment, and enforced full satisfaction

thereof, can not afterward prosecute an appeal or writ of error to reverse it.

"When a party voluntarily extinguishes his own judgment he can not afterwards complain of it. He is under no necessity of suing out execution to enforce his judgment, and receive satisfaction of it; and if, by his own voluntary act, he extinguishes his judgment, what is there on which a writ of error can operate?" (*Cassell v. Fagan*, 11 Missouri, 209.)

"It appears from the record that the appellant recovered a judgment in the district court against the appellee, from which he has attempted to appeal to this court; but, disregarding his own attempt at appeal, he ran his execution in the district court, and satisfied the judgment and costs. This left him nothing to appeal from, and the appeal is, therefore, dismissed." (*Fry v. Bailey*, 36 Texas, 119.)

The reasons above given are the most logical upon which the general rule can be based. But some courts have assigned other reasons for their decisions. For instance:

"It seems inconsistent that a party should proceed on his judgment as good and valid in one court, while he is contending in another tribunal that it is erroneous, and ought to be reversed." (*Smith v. Jack*, 2 Watts & Sergeant, 103; 1 Penn. Repts., 115; 37 Penn. St. Repts., 366.)

"The right to proceed on the judgment and enjoy its fruits, and the right of appeal, were not concurrent; on the contrary, were totally inconsistent. An election to take one of these courses, was, therefore, a renunciation of the other." (*Bennett v. Vansyckle*, 18 New York, 484.)

Many courts have assigned, as a reason for dismissing the appeal, that a party can not, at the same time, take both under and against a judgment.

"We think it a correct principle, and well settled by the authorities, that a party can not accept the benefit of an adjudication, and yet allege it to be erroneous." (*M. & M. Railroad Co. v. Byington*, 14 Iowa, 575; 44 Iowa, 201; 18 Penn. St., 150; 52 Bart., 152; 3 Hill, 215, 216; 30 How. Pr., 397; 34 Ib., 449; 3 La. Ann., 115, 358.)

In accordance with the general principle it is held, also, that where, on making an order, the court imposes on the

party applying therefor the condition that he shall pay a certain sum as costs to the opposite party, the latter, by accepting the payment, waives his right of appeal from the order. (88 N. Y. Supr. Ct., 157; 15 Abb. Pr., 140, note; 1 Robt., 689; 22 Wis., 399; 16 Minn., 405.)

The same principle applies to decrees in chancery as well as to judgments at law. In *Knapp v. Brown*, 45 N. Y., 209, a bill in equity had been filed by a mechanic to enforce his lien against the owner and tenant for improvements upon the leased property. A decree was rendered against the tenant, *Brown*, for \$966.69. He paid the amount without any objection upon an execution issued against him. The court said:

"The issuing of an execution by the appellant upon the judgment rendered in his favor, and the collection of the amount thereof, after bringing an appeal therefrom, by him, was inconsistent with, and a waiver of, his right further to prosecute the appeal. By the former he enforced the judgment as a valid judgment, and secured to himself the fruits thereof, as such. By the latter he seeks wholly to reverse and annul the judgment for error therein. These acts, it is obvious, are wholly inconsistent, the one with the other, and upon principle it is clear that the same party can not pursue both."

In *Holt v. Reese*, 46 Ills., 183, a bill in equity had been filed to foreclose a mortgage, and issue joined on the state of the account between the mortgagor and mortgagee. The court concludes by saying:

"We are clearly of the opinion that a party can not accept money directed to be paid him by a decree, and then ask a reversal on the ground that it did not give him enough. His acceptance was a ratification." (44 Ills., 185; 18 N. Y., 484; 2 Gillman, 414; 18 La. Ann., 62.)

The same doctrine is extended to appeals from interlocutory decrees. Chancellor Walworth said in *Vail v. Remsem*, 7 Paige, 206:

"The complainant's solicitor is clearly wrong in supposing that he has a right to proceed and carry into effect a decretal order which he has himself appealed from, and at the same time that he is proceeding in the appeal to reverse that order, and to confirm the original report of the master. The two

proceedings are wholly inconsistent with each other, and either the one or the other must be abandoned." (Winn v. Dillard, 60 Ala., 373.)

These decisions all place decrees in chancery upon the same footing with judgments at law, but I can conceive of a class of cases in which there ought to be a distinction. As has been said by Justice Grier, "a judgment at law is one thing." Therefore, when you satisfy a judgment at law, you extinguish the whole of it. This is also true of a decree in chancery, which is simply *quod recuperet debitum*. But a decree in chancery may be composed of many parts, which are entirely separate and independent of each other. I see no reason why a party in whose favor such a decree has been rendered should not be allowed to execute one portion of it, and appeal from another portion that is separate and independent of that which he executed. It is true I do not find this distinction settled by any adjudicated case, but it is suggested by the dissenting opinion in the *United States v. Dashiell*, 3 Wallace, 703, and I believe it to be sustained by sound reason.

From the above citations it will be seen that many courts hold that the mere acceptance of satisfaction of the judgment waives the right to prosecute an appeal. But others have held that the right was not lost unless the satisfaction had been coerced by the plaintiff in the judgment. Such was the case in *Benkard v. Babcock*, 27 How. Prac., 393, where it was claimed by the defendants that the plaintiffs had waived their appeal "by accepting from them the amount of the verdict in favor of the latter with costs." Chief Justice Robertson said:

"Numerous authorities have been cited to us on this argument to sustain that position, but they will all be found to be cases where an appellant had attempted actively to enforce either the whole of a judgment, order, or decree in his favor, or else some part thereof, connected with and dependent upon such other part thereof, as he may have appealed from, or else, where he had availed himself of some benefit or favor, granted or offered to him by said judgment or decree, as an alternative to exercising the right of appeal."

In this case the court said the defendant had the right to tender the satisfaction so as to stop the interest and costs run-

ning against him, but by voluntarily exercising this right he could not deprive the plaintiff of his appeal. There are other cases where it has been held that the mere acceptance by the plaintiff of satisfaction does not deprive him of his right to prosecute an appeal. (*Higbee v. Westlake*, 14 N. Y., 288; *Clowes v. Dickinson*, 8 Cow., 328; *White v. Jones*, 4 Cal., 253; *Dickinsheets v. Kaufman*, 29 Ind., 154; *McCreless v. Hinkle*, 17 Ala., 459; *Carleton v. Goldwait*, 23 Ala., 346.)

The conflict of the decisions upon the effect of the plaintiff, with judgment, accepting satisfaction voluntarily offered by the defendant, grows out of the fact that the courts have not assigned the same reason for applying the general rule. For instance, some reason thus: There must be a cause of action to support every complaint; the judgment is the cause of action that supports the appeal; when the judgment is "extinguished" by satisfaction, the right to prosecute the appeal is also extinguished and "nothing is left to appeal from." They thus conclude that the result must be the same, whether the plaintiff coerces or merely accepts satisfaction—in either event the judgment is extinguished, and, therefore, the right to prosecute the appeal is lost. But it may be asked why can the defendant appeal from a satisfied judgment? The answer is, that every appeal is to correct some error; to right some wrong. But the plaintiff, who takes under the judgment, waives the error and has nothing upon which to base his complaint. But the defendant, who has satisfied the judgment, has only augmented the foundation of his complaint or cause of action.

But other courts have held that when a plaintiff coerces satisfaction of his judgment he thereby ratifies it as valid and binding, and is forever estopped from complaining, by appeal or otherwise, that the judgment which he has compelled his opponent to execute is erroneous; that he had the right to accept the judgment as a just and valid one, or appeal and have it reversed as unjust and erroneous; but that he could not do both; that when he had elected to take under the judgment he was estopped from attacking it. But where the defendant voluntarily offers to satisfy the judgment and the plaintiff merely accepts the law of estoppel has no application. Where the satisfaction is coerced the plaintiff makes

the election; where it is voluntary the defendant makes the election. This seems to me to be a very proper distinction. The party "at whose instance" the judgment has been satisfied "can not complain of his own voluntary acts," as said by the court in *Erwin v. Lowery*, 7 How., 184.

But a partial satisfaction of the judgment, even if coerced, is not sufficient to deprive the plaintiff of his right to prosecute his appeal. This was decided in the *United States v. Dashiel*, 3 Wallace, 702. The court say:

"Partial satisfaction of a judgment, whether obtained by a levy or voluntary payment, is not, and never was, a bar to a writ of error, where it appeared that the levy was made or the payment was received prior to the service of the writ. * * * Carefully examined, it will be found that the cases cited assert no such doctrine (appeal waived by partial satisfaction); but that every one of them proceeds upon the ground that where the plaintiff has sued out execution, enforced his judgment and obtained full satisfaction, there is nothing left upon which a writ of error can operate. Import of the argument is that a writ of error lies only on a final judgment, and that the plaintiff, when he accepts full satisfaction of his judgment, removes the only foundation on which the writ of error can be allowed."

But in the case of *Knox's Distributees v. Steele, &c.*, 18 Alabama, 815, a motion to dismiss the appeal was made on the ground that partial satisfaction had been coerced, and the court held that the appellants must refund the money collected before they would be allowed to complete their assignment of errors. The case of *Merriam v. Haas*, 3 Wallace, also bears upon the principles under discussion, but, unfortunately for the profession, no part of the opinion of the court is given, but only the observations of the reporter, who was appointed after the case was decided.

An exception to the general doctrine is also noted in *Kasting v. Kasting*, 47 Ill., 338, where it was held that an appeal from a justice's judgment to the circuit court was not barred by the acceptance of the benefit of the judgment, because the case was tried *de novo* in the circuit court, and such acceptance was no more than a receipt of part of what was claimed, and could be taken into account by the circuit court in rendering judg-

ment. I find no reference anywhere to the effect of refunding the money collected under the judgment appealed from, except among the decisions of the Supreme Court of Alabama. The law in that State may be summed up as follows:

1st. Where the motion to dismiss is made after there is a judgment of reversal the court will even then withhold its mandate until the money is refunded, if satisfaction had been coerced. (9 Ala., 278; 10 Ala., 274.)

2d. Where the motion is made before there is a judgment of reversal, then—

(a) If the satisfaction had not been coerced, but simply accepted, the appellant must refund before he can complete his assignment of errors (45 Ala., 124). The same court had previously held that merely accepting satisfaction did not affect the appeal. (17 Ala., 459; 28 Ala., 346.)

(b) If there is only partial satisfaction, but that coerced, even then appellant must refund before assigning errors. (18 Ala., 815.)

(c) If full satisfaction has been coerced, then it is the "settled practice" in Alabama to dismiss the appeal. (54 Ala., 354.)

3d. These principles are applicable to appeals from interlocutory degrees. (60 Ala., 373.)

It will be noticed that these decisions all refer to refunding under the orders of court. I find no case where the plaintiff has, of his own motion, tendered back the money, and then attempted to plead the effect of it in the appellate court. There might be some difficulty in doing this in Kentucky, where the Constitution says: "The Court of Appeals shall have appellate jurisdiction only." And in *Parks v. Doty*, 13 Bush, 727, the court refused to enforce a contract in pais between the parties, although it related to the pending appeal.

Logic, fair dealing and the peace of society underlie the rule that "a plaintiff who has obtained judgment, and enforced full satisfaction thereof, can not afterward prosecute an appeal to reverse the same judgment which he has already accepted, enjoyed and extinguished." The purchaser at a judicial sale acquires good title and can hold the property, although the case

may be reversed. If a plaintiff was allowed to execute his judgment, and under it sell and pass title to the defendant's property and still prosecute his appeal, the case might be reversed, a new trial ordered and a second judgment entered upon the same demand upon which the first had been satisfied. A plaintiff has the right to elect, to accept his judgment as valid and binding, and have it executed, or he can appeal, and, for errors assigned, ask that it be reversed and set aside; but he can not do both, for, as said by Chancellor Walworth, "the two proceedings are wholly inconsistent with each other." While I find no case where our appellate court has passed directly upon these questions, yet it has decided a kindred principle, viz.: That a party can not accept the benefit of a judgment and afterward attack it (*Fowler v. Woodyard*, 6 J. J. Mar., 607; *Bourne v. Simpson*, 9 B. M., 455). In the latter case the court said: "Having used all the privileges conferred on her by the decree, she is too late in complaining of its burdens, if any such exist."

The question has been usually presented in other States by the defendant filing an affidavit, and having a rule issued against the plaintiff to show cause why his appeal should not be dismissed; or by filing a plea to which the plaintiff demurred. Our Code provides that the appellee may file a verified answer, to which the appellant may file a verified reply, "and the question of law or fact thereon shall be heard and determined by the court." (Sections 757-8.)

Our appellate court has held that, under these sections, it has jurisdiction to try whether "the appellant's right to prosecute the appeal further has ceased," for any reason appearing on record. In the case of *Riley v. Reed*, 13 Bush, 412, it was held that the appellee could plead the statute of limitation. And in *Parks v. Doty*, 13 Bush, 727, where the court refused to enforce a contract in pais between the parties, they said, however, that "matters of record may be brought to the notice of this court by pleadings filed under section 757, Civil Code of Practice." So if the satisfaction does appear of record, under these decisions it can be pleaded, if necessary. But if the satisfaction appears as part of the same record as that upon which

the appeal is pending, I see no reason why the question could not be raised by a simple motion to dismiss.

A. E. RICHARDS.

COX v. STORY, &c.

(Filed February 11, 1882.)

1. Mistake in the description of twenty acres of land intended to be conveyed did not defeat the title of the grantee, who was put into possession of the twenty acres actually intended to be conveyed.

2. Possession of twenty acres of a ninety-five-acre tract of land, under a deed which was intended to, but did not, convey it, was adverse to a subsequent purchaser of the remaining seventy-five acres, whose deed by mistake included both the twenty and the seventy-five acres.

3. Revivor of an action against infants was valid against three over fourteen years of age, upon whom a copy of the order of revivor was properly served, but was void as to three under fourteen years of age, because a copy of the order of revivor served upon them was not also served upon their father or guardian or mother, or some white person having care or control of them or with whom they lived, as required by section 81 of the Code of 1854.

4. Right of infants over fourteen years of age to show cause against, or to vacate or modify the judgment against them, was barred, and they were concluded by the judgment against them in this case, because they did not file their petition to show cause against, or to vacate or modify the judgment against, them within twelve months after some one of them arrived at the age of twenty-one years.

5. Right of each of the infants against whom a void judgment was rendered to show cause against or to set aside such void judgment was not barred, and they were not concluded by it, because they filed their petition to set the same aside within twelve months after the youngest of the three became twenty-one years of age.

Appeal from Daviess Circuit Court.

Opinion of the court by Chief Justice Lewis.

John A. Head, being the owner of a tract of about 450 acres of land, conveyed the whole of it, except about ninety-five acres, to his children in fifty-acre lots. Not long before his death he gave to his daughter, Mrs. Story, mother of appellees, and attempted to convey twenty acres of the portion undisposed of in addition to the fifty acres previously given. But by a mistake in the deed, caused by his absence from and want of familiarity with the land, the twenty acres, instead of being located south of and adjoining her fifty-acre lot, where the

land undisposed of was situated, was located inside the boundary of a lot previously conveyed to his daughter, Mrs. Triplett.

After his death his executor caused commissioners to be appointed by the county court to lay off the twenty acres for Mrs. Story where her father intended it to be. And though they returned to the court no report of what they had done, it is proved that they surveyed and marked the boundary of the lot, and that she and her husband were there and then put in possession of it by the executor.

After that the executor sold and conveyed to Dabney, the vendor of appellant, the residue of the original tract, described in the deed as seventy-five acres, more or less.

Though there is some contrariety of evidence upon the subject, we think it is satisfactorily shown that Dabney, before he purchased, was shown the marked boundary of the twenty-acre lot, and neither purchased nor paid for any part of it. The seventy-five acres purchased by him is described in the deed as bounded in part by the line of Mrs. Story, and it is now contended that it was the line of the fifty acres and not of the twenty acres that was meant. But we think that deed should be construed, as Dabney manifestly understood it at the time, to cover only the seventy-five acres, or as it now appears seventy-seven acres he purchased, and that his boundary should be restricted and confined by the marked lines of the twenty acres, and not extended over so as to include that tract.

In the deed from Dabney to appellant the seventy-five acres is described for the first time as adjoining and being bounded by the fifty-acre tract of Mrs. Story, and thus made to cover and include the twenty acres that lies between them. But as Story and wife were, at the date of that deed, in the actual and adverse possession, it did not operate to confer title upon appellant.

In 1858 appellant brought an action against Story and wife for the recovery of the twenty acres, and in 1865 a judgment was rendered in his favor. But in 1860, pending that action, she died, and an attempt was made to revive it against her children.

At the time the order of revivor was made in that action Moses B., James and Ann P. Story were each over fourteen years of age, and the service of a copy of the order of revivor

upon them was sufficient. And as this action was not commenced by them within twelve months after either of them would have arrived at the age of twenty-one years, the children and heirs at law of Ann P. as well as C. L. Story, father and heir at law of Moses B. and James Story, are concluded by the judgment rendered against them in 1865.

But as to the other three children of Mrs. Story, viz., Robt. T., Mary and Margaret Story, who were each under the age of fourteen years when the copy of the order of revivor was served upon them, that judgment is void. Section 81, Myers' Code, in force at the time, required a copy of the order of revivor to be served upon each of them and upon the father or guardian of each, or if neither father nor guardian could be found, then upon the mother or any other white person having care or control of them or with whom they lived.

There was no service upon any of the persons mentioned in that section except upon the infants themselves.

When that judgment was rendered neither of them was before the court, and consequently neither of them is concluded by it.

Though Margaret is the only one of the three who commenced this action within twelve months after arriving at the age of twenty-one years, and consequently is the only one who has the right to show cause against the judgment, or to have it vacated or modified as provided in sections 421 and 579, Myers' Code, still either one or all of them may maintain the action for the recovery of the land, and if they have shown title to it, or any part of it, are entitled to recover, notwithstanding that judgment, it being no bar.

In 1861 the executor of John A. Head conveyed the twenty acres to the children of Mrs. Story by deed, executed, as is alleged and not denied, in pursuance of the power given by the will. Though that deed was executed during the pendency of the action of appellant against Story and wife, we do not consider the children of Mrs. Story as in any sense pendente lite purchasers, or that the judgment rendered in that action concluded either Robt. T., Mary or Margaret Story from now relying upon the deed which, in our opinion, invested each of them with the title to an undivided sixth of the land.

But they are not entitled to recover the whole of the twenty acres, and the court below erred in adjudging to them more than one-half thereof, or one-sixth to each of them.

Wherefore, the judgment is reversed and cause remanded for further proceedings consistent with this opinion.

W. N. Sweeney for appellant.

G. V. Triplett for appellees.

HARRELD v. HOWARD (2 CASES).

(Filed February 2, 1882.)

1. Motion by defendant to transfer action upon filing equitable defense from the Butler Common Pleas to the Butler Circuit Court being resisted by plaintiff, by filing affidavit that he believed that he would succeed in the action. etc., and the defendant failing to execute bond as required by section 14 of the Code, was properly overruled.

2. Motion by defendant to transfer his answer and cross petition from the common pleas to the circuit court was properly sustained, and was equivalent to withdrawing his answer and defense to the action in the common pleas court on the note.

3. By transferring his answer and cross petition to the equity docket of the circuit court the defendant did not take the action on the note out of the common pleas court, and, therefore, having withdrawn his answer and defense from that court judgment was properly rendered against him as by default in that court.

4. After filing equitable defense and moving to transfer to the equity court no trial of the action or judgment by default could have been had until the equitable issues presented in the answer had been disposed of.

5. By transferring the defendant's answer and cross petition to the equity court and leaving the original action in the common pleas court the equitable issues were severed, and might be tried in the absence of the original action.

It was not necessary for the clerk to transfer the papers of the original action, and, therefore, the circuit court erred in dismissing the answer and cross petition because the original petition was not transferred with the answer and cross petition.

Appeals from Butler Common Pleas and Circuit Courts.

Opinion of the court by Judge Hargis.

The appellee sued the appellant on a note for \$338.65 in the common pleas court, and the latter pleaded an exclusively equitable defense to the action, and moved to transfer the cause to equity.

Upon that motion the appellee filed his affidavit, setting forth the belief that he would succeed in the action and that

the collection of his claim, after judgment, would be endangered by the delay arising from the transfer of the cause.

And the appellant having failed to execute the bond required by the fourteenth section of the Civil Code, his motion to transfer was overruled.

He then moved to transfer his answer and cross petition to the circuit court, which had equity jurisdiction, and his motion was sustained.

This action upon his part was equivalent to withdrawing his answer and defense to the appellee's suit on the note, as by making such a motion he could not carry the case out of the common pleas court and prevent the operation of the rule prescribed by the fourteenth section of the Code, but he could thereby secure a trial and disposition of his defense by an equitable tribunal, although he was compelled to submit to an adverse ruling on the motion to transfer because of his inability to give the required bond.

Had he let his answer remain where it was when his motion to transfer was overruled no judgment could have been rendered against him until the issue presented by it was disposed of, because he had the right to rely upon an equitable defense, and, having made the motion to transfer the case to equity, no trial of the action or judgment by default could have been had, as is contemplated by the third subsection of section 10 of the present Civil Code. (*Petty v. Malier, &c.*, 15 B. M., 604-5; *Frazer, &c. v. Naylor, &c.*, 1 Met., 596.)

By these authorities and the terms of said subsection and section 13, which is not found in the Code of 1854, this conclusion is made inevitable, but the appellant, by his own action, made it the duty of the court to render judgment by default against him, and he can not now be heard to complain of that which he voluntarily permitted.

The judgment of the common pleas court is, therefore, affirmed.

But the action of the circuit court in dismissing the answer and cross petition, because the original petition was not also delivered to the clerk of that court as part of the papers of the action is, we think, erroneous. Section 13 (Code) provides that in counties wherein the jurisdiction of circuit courts is

vested in different courts the provisions of Title II, concerning transfers to the proper docket, apply to transfers to the proper courts, and we must, therefore, consider the question before us as if the motion were made in the circuit court to transfer the case to the equity docket.

By subsection 2 of that section this language is used: "Upon an order for the transfer of an action from one court to another the papers in the action and a copy of the order shall be delivered by the clerk of the court which makes the order to the clerk of the court to which the action is transferred; and it shall proceed as if it had been brought in the latter court."

The appellant's answer and cross petition alleged a mistake in the execution of the note which was given to equalize the capital paid into a partnership firm composed of the appellant, appellee and T. C. Carsen; and that upon a settlement of the partnership the appellee would be shown to owe him more than the amount of the note. The allegations elaborate this defense, which is essentially a counterclaim.

In the case of *Geoghegan, &c. v. Ditto, &c.*, 2 Met., 438, this court held that an equitable issue might, and should be, transferred to the equity docket, leaving the claim for damages for trespass to be tried by a jury in the ordinary action.

And speaking of set-offs, counterclaims and cross petitions, it is said in *Newman on Pleading*, 618, that "they each differ in some respects from the other, yet they are substantially the same kind of pleading," and "each of them is a cross action in favor of the defendants," etc. (Subsection 84 of section 732, Civil Code, construed in *Warfield v. Gardner*, MS. opinion, December, 1881.) While formerly the dismissal of the original action carried the set-off with it (8 B. M., 287), the present Code, as well as the Code of 1854, entitles a defendant to a trial of a set-off or counterclaim, although the plaintiff dismiss his action or fail to appear.

As a severance of the legal and equitable issues, the legal triable by jury and the equitable by the chancellor, is authorized by authority, and a counterclaim is in every essential an action as much so as a cross petition or cross bill in equity, and can be tried although the original action be dismissed, we perceive no necessity for the delivery by the clerk of the com-

mon pleas court of the original petition as part of "the papers in the action" to the clerk of the circuit court, when the action and equitable issue transferred to it is fully and legally alleged in the answer and cross petition, and can be intelligently and legally tried in the absence of plaintiff's action.

Therefore, the judgment of the circuit court is reversed and cause remanded for proper proceedings.

Ward & Guffy for appellant.

L. J. Smith for appellee.

SPALDING v. HENSHAW.

(Filed February 2, 1882.)

1. Delivery of money by principal in a note to his surety therein, to be paid to the payee, did not increase or diminish the liability of the surety to the payee, or give him any additional security for the payment of his debt or create a trust or lien in favor of the payee of the note.

After recovering a judgment against such surety on the note the payee could not recover against him another judgment on account of the money delivered to him by his principal.

2. Contract by one person for the benefit of another may be accepted and enforced by the latter.

But such a contract may be revoked or canceled by the party making it at any time before it is accepted by the party for whose benefit it is made.

"A promise by A to B, upon a sufficient consideration, to pay C a sum of money, may be enforced, but when the parties making the contract rescind or cancel it before its acceptance by the third party, for whose benefit it is made, the contract is at an end."

Appeal from Union Common Pleas Court.

Opinion of the court by Judge Pryor.

The appellee, George Henshaw, held the note of John B. Payne, with George Payne as surety, for the sum of \$1,000, payable in twelve months from the 7th of September, 1856. In March, 1857, John Payne, desiring to pay the note, gave to George Payne, the surety, the sum of \$1,000 for that purpose, and took from him the following receipt:

"Received of J. B. Payne \$1,000, which I promise to pay to George Henshaw in gold, to pay a note that George Henshaw holds on him, and I am surety to.

(Signed:) "GEORGE PAYNE."

In May, 1861, John B. Payne, George Payne, the surety, having failed to pay this money to Henshaw, instituted an action against him, in which it is alleged that he paid over to George Payne the \$1,000 on the 25th of March, 1857, to be paid to Henshaw, and took his receipt therefor; that the latter had failed to pay the money to Henshaw as directed, and still refuses to do so or to refund to him, John B. Payne, the money, although often requested so to do. He set up other claims against George in the same action that have no connection with the matter in controversy, with the exception that a general attachment was levied on the property of George Payne to secure the demand against him.

John B. Payne it seems was embarrassed with debts as well as George, and I. A. Spalding, as administrator of one Powell and other parties, brought their actions against John B. Payne and obtained attachments that were levied on the estate of John and garnished the claim of \$1,000 owing by George Payne. George Payne died and the action of John Payne was revived against his administrator, and in April, 1868, there was a judgment rendered in favor of John B. Payne against the administrator for the \$1,000. There were various actions consolidated in the effort to make the debts due by John and George Payne, and in April, 1868, \$500 of the judgment against George Payne's administrator, and in favor of John B. Payne, was directed by the court to be paid to the attorneys of John B. Payne, or they were given a lien to that extent.

Henshaw, in March, 1862, brought his action and recovered a judgment against George Payne on the note for the \$1,000 executed by him and John, and in October, 1869, filed a petition to be made a party to the action of John Payne against George Payne, alleging in the original petition and the amendment that he had recovered a judgment against George Payne on the note, the delivery over by John to George of the \$1,000 to pay it, and the recovery by John Payne of George Payne's administrator on the receipt for the \$1,000, and its collection by I. A. Spalding, the attorney of John Payne, who then, as is alleged, had it in his possession. He sued out an attachment and garnished this money in the hands of Spalding.

Spalding filed a demurrer and answer. The answer alleges that as administrator of Powell he had garnished or attached all these funds owing to John Payne to satisfy the claim of Powell; that after applying all these claims the debt to the Powells remained unsatisfied, and that he had in addition purchased of the heirs of Powell their interest and was entitled to the fund. The claim of Powell's Adm'r against John B. Payne, was large, and the action to recover, with attachments served and levied, had been pending long before the attempt on the part of the appellee, Henshaw, to subject the fund arising from the judgment against George Payne, based on the receipt for \$1,000.

It is manifest from the facts contained in the record that the court below was of the opinion that the execution of the receipt by George Payne to John B. Payne, in which the former agreed to pay the \$1,000 to the appellee, Henshaw, gave to the latter a lien or an equity superior to all other creditors. Both John and George Payne were the obligors on the note to the appellee, and the fact that John had furnished to George Payne, the surety, the money to enable him to satisfy the debt did not increase or diminish their liability to Henshaw, the appellee, or give to him any additional security for his debt. He already had George Payne bound as surety on the note, and if he had instituted an action against him could have recovered only the \$1,000. This sum he did recover of George in an action on the note in 1862, and if he had instituted an action after this to have recovered on the receipt, by reason of the agreement between John and George Payne, the judgment on the note as to George could have been pleaded in bar, as he was not entitled to two judgments for the same debt.

There was nothing to prevent an execution on the judgment rendered on the note or a resort to all incidental remedies to enforce it. The appellee at no time agreed to look to George Payne alone for the debt, and seems not to have known until October, 1869, that George had executed the receipt, in which he promised to pay the \$1,000, then received, to him in discharge of the note. It is insisted, however, that the receipt was in effect an obligation by George Payne to pay the appellee

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the \$1,000, and, although he had recovered a judgment on the original note against George, yet as the money was collected on an obligation belonging or for the benefit of the appellee, that he is entitled to it. Adopting, therefore, the theory maintained by the appellee for the purpose only of making the inquiry suggested by it and regarding George Payne, who received this money, as an entire stranger to the original note, and his promise made in no other manner than as found in the receipt, and the appellee is not entitled to recover. He at no time ratified, accepted or confirmed the action of John Payne or George with reference to this money, and in fact never heard of it, so far as this proof shows, until after John had recovered it back from George Payne, and after it had been subjected or a lien created upon it by the creditors of John Payne for the payment of his debts.

George Payne received the money as the agent only of John Payne, and the latter, before its acceptance by the appellee or his agreement to look to George for payment, could have revoked the direction or order to pay it to the appellee, and this he certainly did by instituting his action and recovering a judgment for the money upon the alleged ground that his agent had failed to pay it to the appellee.

He might, as the surety, under certain circumstances, have held it for indemnity, but we are discussing this case as if George was in no manner liable, except on his promise to pay to Henshaw. That Henshaw might have maintained an action against George, if he had not been already liable, is settled by several adjudged cases in this court. A promise by A to B, upon a sufficient consideration, to pay a sum of money to C may be enforced by C, but when the parties making the contract rescind or cancel it before its acceptance by the third party, for whose benefit it is made, the contract is at an end. There is nothing in this case to make the contract irrevocable, or facts authorizing the presumption that the party benefited has assented to the agreement. Here the appellee could have instituted an action at any time to recover on the original note, as he did do, and recovered a judgment—taking the name of George Payne from the note, and it was a delivery by John Payne to George of \$1,000 to pay this debt, and the debtor had the right,

at any time before its acceptance by the creditor, to demand its payment back to him, to be appropriated, if he so desired, for other purposes. In the case of *Davis v. Calloway*, 80 Indiana, in an agreement between Calloway and Kaplinger, Calloway agreed to pay Davis \$100. It appeared from the second paragraph of the petition that the parties had rescinded the agreement, and the court said: "Until the acceptance by Davis of the promise by Calloway the parties to the agreement had the right to rescind." In the case of *Barrett v. Hughes*, 48 Wisconsin, 819, in discussing a kindred question, the court said: "After knowledge of and assent to such engagement by the person for whose benefit it is made, his right of action on it can not be affected by a like sum of the agreement by the parties thereto."

In 33 New Hampshire, 171, it is said: "A party who deposits money with another to be appropriated for the benefit of a third person, being under no obligation to appropriate it, has a right to countermand the appropriation and recall the money at any time before it is appropriated, or before a privity has been created between the depositary and the beneficiary that amounts to an appropriation of it."

In *Story on Bailments*, etc., 210: "In cases of mandates when the thing is to be delivered to a third person, if the latter has no vested interest in it, the bailer may revoke the bailment at any time."

There is no pretense in this case of any release of the original note, but on the contrary, after the receipt was executed, a judgment was obtained upon it, and not until John Payne had recovered a judgment against George Payne's administrator for the failure to pay this money over did the appellee attempt to assert any claim apart from the original note against George Payne and if he had, no recovery could have been had, as he then had a judgment in his favor against George for the \$1,000. No lien existed on the fund and none could have been enforced as against these creditors, as we have already shown, if George Payne had stood in no other light than as a mere depositary of the money. It had been recovered from him by John Payne; and Spalding, in his representative capacity and in his individual right, insists that he has already appropriated it. The

case must go back and permission given the appellant to file his amended answer, and the questions as to the priority of liens by reason of the various attachments and judgments rendered can be heard and determined.

The judgment is reversed and cause remanded for further proceedings not inconsistent with this opinion.

I. A. Spalding and W. P. D. Bush for appellant.

A. Duvall for appellee.

RAGSDALE v. LANDER, FOR, &c.

(Filed February 4, 1882.)

1. In action on a verbal lease for two years, and also for the use and occupation of the leased premises—the use and occupation and alleged value thereof being denied by answer—the only issue to be submitted to the jury was as to the use and occupation and the value thereof.

The finding of the jury that “the defendant rented the property for two years,” did not authorize the court to render judgment for the amount of the alleged rent prayed for.

The defendant had the right to have submitted to the jury, by appropriate instructions, the question whether he did use and occupy the leased premises, and if so, what was the reasonable value of such use?

As the verbal contract to lease for two years was nonenforceable, the contract price was also nonenforceable.

2. The rule as to allegations of value, etc., fixed by section 153 of the Code of 1854 was changed by section 126 of the Code of 1877.

Appeal from Christian Circuit Court.

Opinion of the court by Judge Hargis.

The contract of leasing was verbal and for two years, and, therefore, within the sixth clause of section 1, chapter 22, General Statutes, which declares that “no action shall be brought to charge any person * * * upon any contract for the sale of real estate, or any lease thereof for longer term than one year.”

The petition alleged facts sufficient to constitute a cause of action for use and occupation of the leased premises. The use and occupation and the value thereof were denied by the answer.

This was the only issue which remained to be submitted to the jury after the court directed them to find a special ver-

dict, whether the lease was for one or two years. But instead of instructing the jury upon that issue the court submitted the single fact named for their special finding, and upon the return of the following verdict: "We, the jury, find that the defendant rented the property for two years," rendered judgment for \$300, with interest from the expiration of the lease, which conformed to the prayer of the petition.

By section 153 of the Civil Code of 1854 allegations of value or of amount of damage could not be considered as true by the failure to controvert them. But section 126 of the present Code, in prescribing the classes of allegations "which must be proved, though not denied," provides in its fourth subsection that:

"Allegations concerning value or amount of damage, not accompanied by an allegation of an express promise, or by a statement of facts showing an implied promise to pay such value or damage, such allegations so accompanied need not be proved unless traversed."

This provision introduces two exceptions to the law as expressed in section 153 of the Code of 1854. Under that section no allegation of value or amount of damage could be treated as true by the failure to deny it, but by section 126 of the present Code every allegation of value or amount of damage, which is accompanied by an allegation of an express promise or a statement of facts, from which the law implies a promise to pay such alleged value or damage, must be considered as true unless denied.

The appellee alleged in his petition the value of the use and occupation, and made a statement of facts which raise a promise upon the part of appellant to pay that value, and but for his traverse it would have been the court's duty to have taken the averments of the petition as true, and then judgment for the alleged value would have been legal. But the appellant traversed and put in issue, not only the value of the use and occupation, but the use and occupation itself.

He, therefore, had the right to have submitted to the jury, by appropriate instructions, the question whether he did use and occupy the leased premises, and if so, what was the reasonable value of such use.

The court decided both of these facts on which the parties had joined issue by rendering judgment for \$300, which was the amount prayed for, and also the alleged contract price of the lease.

As shown, this was error unless the special verdict of the jury authorized the judgment.

The special verdict established but one fact, and that fact made it clear that no action could be brought to charge the appellant upon the lease.

And as the contract was nonenforceable by reason of the statute of frauds, the contract price was also nonenforceable, for to allow the recovery of the price agreed upon by the contract, but deny an action upon the contract itself, would be equivalent to granting and denying the remedy in the same action.

Wherefore, the judgment is reversed and cause remanded, with directions to grant appellant a new trial and for further proceedings consistent with this opinion.

Campbell & Ferguson and G. A. Champlin for appellant.

John Feland for appellees.

ALLEN, &c. v. STUMP.

(Filed February 9, 1882—Not to be reported.)

1. Jurisdiction to sell infant's real estate, on proceedings by statutory guardian under chapter 86 of the revised statutes, depended upon compliance with the requirements of the statute.

2. Statutory guardian means one appointed in pursuance of the laws of this Commonwealth, and by the tribunal authorized thereby to make the appointment.

3. Void judgment to sell lands of infant on petition of nonresident guardian—On petition of nonresident guardian for his infant daughter, appointed in the State of Missouri, filed in the Harrison Circuit Court, in this State, in 1869, asking that court to decree the sale of the remainder interest of such infant in lands in that county, without any defense being made for her by guardian appointed in this State, either statutory or ad litem, that court had no jurisdiction to decree the sale of such remainder interest, and, therefore, the decree to sell the same was void, and the purchaser acquired no title to such remainder interest; but upon the termination of the life estate of her father such infant became entitled to the possession of the lands.

Appeal from Harrison Chancery Court.

Opinion of the court by Chief Justice Lewis.

To give the court jurisdiction and authorize a judgment for the sale of the real estate of an infant, under article 8, chapter 86, Revised Statutes, it was indispensable that the petition for such sale should be filed by the statutory guardian, and that he should allege in it his belief that the sale would redound to the benefit of the infant. Besides other requisites to a judgment, it was made the duty of such guardian to enter into a covenant, with security approved by the court, for a faithful discharge of his duty under the statute.

It is apparent from the language, as well as the reason of the law, that the statutory guardian meant is one appointed in pursuance of the laws of this Commonwealth, and by the tribunal authorized thereby to make the appointment.

If it had been the intention of the legislature to authorize such judgment upon the petition of a guardian appointed elsewhere than here, it would have been so provided in express and unambiguous terms.

In 1869, upon the petition of Chas. T. Daniels, who was appointed guardian in the State of Missouri of his infant daughter (appellant) Maria V. Daniel, now Allen, and without any defense being made for her by a guardian appointed in this State, either statutory or *ad litem*, judgment was rendered for the sale of her remainder interest in two lots of land, and the property was sold, and without an order of court the proceeds were paid over to him and carried out of this Commonwealth.

The sale of the interest of appellant, Maria V. Allen, in the lots was, in our opinion, void as to her, and the purchaser acquired no title thereto, except to the extent of the life estate of Chas. T. Daniels.

Appellant, Maria V., having been made a party plaintiff in this action, and the petition having been dismissed as to so much thereof as sought a sale of her remainder interest in the property, the cause of action as it then stood was for the purpose of determining the conflicting claims of herself and appellee, and to quiet her title. We think she was entitled to such relief, and the court below, instead of dismissing the petition,

should have rendered judgment ascertaining and determining that she was not divested of her interest in remainder by the proceedings referred to, but was, upon the termination of the life estate of her father, entitled to the possession of the property.

As the record stands neither the pleadings nor proof required her to account for any part of the proceeds of the sale made in 1869.

Wherefore, the judgment of the court below is reversed and cause remanded for further proceedings consistent with this opinion.

Charles Offutt and L. M. Martin for appellants.

A. H. & J. E. Ward for appellee.

CITY OF LOUISVILLE v. SHERLEY'S GUARDIAN, &c.

(Filed February 11, 1882.)

1. Personal estate of infants residing in Jefferson county, in the hands of their statutory guardian residing in the city of Louisville, is not subject to taxation in said city for municipal purposes—for the benefit of public schools in said city, etc.

2. When children continue to reside at the domicile of their deceased parents, in Jefferson county, such domicile will be considered as their residence until changed, although their guardian may reside in the city of Louisville.

3. The mere fact that the guardian of an infant resides in the city of Louisville, while such infant is domiciled in another county or outside of the city limits, will not subject his estate in the pockets of his guardian, or the vaults of a city bank, to taxation for municipal purposes.

4. The proper plan to list personal property in this State, or rather its value under the equalization clause, is in the county where the owner lives, and the personal property of infants living in Jefferson county, outside of the city of Louisville, should be listed with the assessor of that county, and be subject to taxation for State and county purposes, but not for the support of the Louisville city government.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

The appellees are the infant children of Louis A. and Laura Sherley, both of whom are dead. Their father was living at the time of his death in the county of Jefferson, about ten miles from the city of Louisville, the children living with him,

and where they continued to reside for several years after the loss of their parents.

Their paternal grandfather, Z. M. Sherley, was their statutory guardian and lived in the city of Louisville, but the children continued to reside at the domicile of their father in Jefferson county, outside of the corporate limits of the city. The infants derived from their father a considerable amount of personal estate, consisting of notes, bonds and stocks, that passed into the hands of their guardian. This personal estate, as the appellees allege, was for several years wrongfully and illegally assessed for taxation by the city of Louisville, and the taxes were paid by their guardian under the belief that this property was liable for taxation for municipal purposes. The taxes levied on this property and paid by the guardian were, first, a tax of 25 cents for the benefit of the public schools of the city; second, a tax in aid of the E. H. railroad; third, a tax in aid of the St. Louis Air Line railroad; fourth, a tax to reconstruct the streets of Louisville. The infants owned no real estate within the city, and it is claimed the infants derived no benefits from the taxation, and that their guardian, although residing within the corporate limits, was compelled wrongfully to pay this tax, or paid it under the belief that as his domicile was within the city, this personal property in his possession was subject to municipal taxation. The facts are fully set forth in the petition, to which there was a demurrer, the demurrer overruled and the appellant (the city) failing to plead further a judgment was rendered against it. The right to maintain such an action has been repeatedly decided by this court, and it seems to us the only question in the case is, does the fact that the guardian of these infants, and the custodian of their personal estate, is domiciled in the city of Louisville subject the estate of the children to taxation for municipal purposes? The inhabitants of the city who derive, or who are entitled to the benefits and protection of the municipal government, are made to contribute to the common burden by reason of the benefits received, but in what manner are these children, who live ten miles distant in the country, benefited by all these advantages resulting from their residence inside of the corporation? They are not educated at the

public schools of the city, and have no real estate to be enhanced in value by reason of railroads and street improvements.

Whether or not the domicile of the owner of the property is the true test in determining the right of the municipality to tax in this case is not necessary to be decided. It is certain the mere fact of the guardian living within the city and having the custody of the infants' notes and bonds will not authorize the municipality to tax them. The guardian has no interest in the property, nor is it pretended that the children derive any other benefit than its mere possession by their guardian, who happens to be living within the city limits. The domicile of the father was that of the infants, and no change of domicile had been made by the guardian when these taxes were imposed and paid. While the authorities are in conflict as to the right of the guardian to so change the home of the ward as to affect the right of succession to the property of the infant, we perceive no reason, where both the parents are dead and the guardian entitled to the custody of the infant and his property, of withholding from him the right, when acting in good faith and with no view to work an injury to his ward or the estate, to select and fix for his ward a permanent home. A change of the infant's domicile, particularly when both parents are dead, may become a necessity, and when done from disinterested motives and for the purpose of making an actual and permanent change of domicile the right should be conceded. It is certain that the domicile of the guardian is not necessarily the domicile of the ward, and when the parents are dead their place of domicile is that of the children surviving them, and will so continue until their domicile is changed. In the case of *School Directors v. James, 2 Watts and Sergeant's Reports, 568*, the minor children lived with their mother in one township and their guardian in another. It was held that their personal property was not liable to taxation for school purposes in the township where the guardian lived. It was said in that case "the situs of their movable property attended the domicile of their persons and is taxable only there;" and further, "the guardian must not be allowed to burden his ward with a certainty of loss by subjecting his property to taxation for purposes in which the ward has no interest."

In the case of *Mason v. Thornton*, 1 Rhode Island, it was held "where the guardian of a lunatic changed the domicile of the lunatic in good faith and with the intention to make it his permanent home, the ward became liable to be assessed in the town to which he is removed. In the case of the Burough of *Carlisle v. Mainhall*, 76 Penn., an analogous question to the one under consideration was determined adversely to the exercise of such a power. This doctrine is not in conflict with the position assumed by counsel for the city, that when persons residing abroad bring their property and invest it in this State for the purpose of deriving profit from its use, having sought the benefits and protection from our laws, should be made to contribute to the support of the government. The mode of taxation, both as to the person and property to be taxed for State and municipal purposes, is regulated in many of the States by statute, and parties owning property, real or personal, located and used within a municipality and deriving the protection of the local government may be required to pay a tax upon it.

This is just and equitable, and they should not be allowed to obtain the benefits of the city government and at the same time require the actual resident to assume the entire burden of taxation. While the situs and control of the property may by law be made the test of its being subject to taxation in a particular locality, whether in the hands of the owner or the agent, still the mere fact that a guardian of infants lives within the municipality, while the infants are domiciled in another county or outside of the city limits, will not subject their estate in the pockets of the guardian or the vaults of a city bank to taxation for municipal purposes.

The proper plan to list personal property in this State, or rather its value under the equalization laws, is in the county wherein the owner lives, and as the infants living in the county of Jefferson, their personal estate should have been listed with the county assessor. This property is subject to taxation for State and county purposes, but not for the support of the city government.

It was necessary, by reason of the loss of these parents, that a guardian should take charge of their estate, and because he

is required to take the actual custody of the money, notes and bonds left by their father, we are asked to transfer, by implication, their place of residence from the county to the city, for no other reason than to subject their estate to a burden from which they derive no benefit, and when it is beyond their power to prevent their guardian from taking it into his possession. It would be neither just nor equitable to prevent the imposition of such a burden on infants whose misfortunes alone caused the transfer of the possession of their personal estate to one living away from their domicile. While being educated at their homes, they are taxed to maintain the public schools of Louisville, and compelled to contribute to the common burden in discharging the debts of that corporation for the construction of streets and railroads.

The safety and value of their estate is as well protected and preserved by the State government as that of the municipality into which it has been carried. They have not sought its protection or claimed its benefits, and were powerless to restrain the guardian from taking this property from the domicile of their father in Jefferson county to his domicile in the city of Louisville. So whether the situs of personal property for the purposes of taxation is the domicile of the owner, or applies only to the distribution of the estate in case of intestacy, is not necessary to inquire, as this case shows a taxation for purposes from which those infants derive no benefits. It must be a harsh rule to determine that the home in the city of Louisville of the guardian of infants residing in the county of Oldham or Jefferson becomes the home of the infants and their personal property liable to a burden they had no voice in imposing, and from which they derive neither a pecuniary interest nor protection. This is not a case where the guardian is conducting a business for the infants or investing money for nonresidents, nor is it a case where the representative is invested with title to the estate he represents, and while the case of a personal representative or trustee might present stronger reasons for taxation, we do not determine that such representa-

tive would be liable, as the case is not before us. The judgment for the reasons indicated is affirmed.

T. L. Burnett for appellant.

H. C. Brannin and John Roberts for appellees.

FUQUA, &c. v. FERRELL, &c.

(Filed February 11, 1882.)

1. Payment of a debt by insolvent debtor in money and corn, exempt from execution, before the commencement of a suit by another creditor to have a mortgage executed by such debtor to secure the debt so paid in contemplation of insolvency, was not in violation of the statute.

If such payment had been made after, instead of before, the commencement of the suit, it would have been within the inhibition of the statute.

The corn was exempt from execution; its sale was not, therefore, within the statute.

2. In order to bring a sale, etc., before the institution of the suit, within the interdiction of this statute, the same allegations and proof must be made as if suit were originally brought to declare such sale, etc., to have been made in violation of the statute; for it may be that such payment was not made in contemplation of insolvency or with a design to prefer the payee to the exclusion of other creditors.

Appeal from Butler Circuit Court.

Opinion of the court by Judge Hargis.

Ferrell executed a mortgage on growing corn and tobacco to Hatcher to secure the payment to him of \$200 that had been due sometime before the execution of the mortgage.

Suit was brought by appellant for the purpose of having the mortgage declared to operate as an assignment of all of the property of Ferrell to the benefit of his creditors, because of an alleged preference of Hatcher to the exclusion of other creditors.

Before the suit was brought Ferrell paid Hatcher \$174.50 in money on his debt, and shortly after its institution he paid the remainder of the \$200 in corn that was exempt from execution.

The sole question is whether these payments were in violation of the statute, the mortgage having been made in contemplation of insolvency.

The last clause of section 4, article 2, chapter 44, General Statutes, reads:

"And the court shall also compel every person who shall acquire by purchase, assignment or otherwise, any property or effects from such debtor, after the suit contemplated by this act shall be instituted, to surrender the same to such receiver."

Had the \$174.50 been paid after instead of before the suit was instituted there would be no question but the payment would have been within the inhibition of the statute.

The act of paying the \$200 is not attacked by the pleadings. They relate to the act of mortgaging the corn and tobacco, and although the mortgage of the tobacco was in violation of the statute, it does not follow that the payment of the \$200 was made with the same purpose and motive, and also in violation of the act.

In order to bring a sale, purchase payment, assignment or other acquisition from the debtor of his property or effects, by a creditor or any other person, before the institution of suit, within the interdiction of the statute the same allegations and proof must be made with reference to such purchase payment, etc., as if suit were originally brought to declare them, or either of them, to have been made in violation of the act.

For it may be that the payment was not made either in contemplation of insolvency, or with any design to prefer the payee to the exclusion of other creditors.

The clause quoted from the statute does not dispense with allegation or proof of the necessary facts to make out a cause of action under the statute unless the acquisition of the property or effects from the debtor were made after the suit shall have been instituted.

With reference to all such acquisitions after suit shall be brought, whether made by creditor or innocent purchaser, it is only necessary to show the act of acquiring the property or effects from the debtor in order to give the court power to compel the surrender of such property to a receiver.

The corn was exempt from execution and its sale was not, therefore, within the statute. (*Lishy, &c. v. Penny, &c.*, 6 Bush, 576.)

Judgment affirmed.

L. J. Smith for appellants.

Ward & Ward for appellees.

ST. JOSEPH'S ORPHAN SOCIETY v. WOLPERT, &c.

(Filed February 16, 1882.)

1. Joint action can not be maintained against several persons upon separate and distinct demands against them respectively, and, therefore, the court below properly sustained a motion to require the plaintiff to elect as to which one of the defendants he would prosecute this action.

2. For board, care and education of infant orphans, whose control was sought by the St. Joseph's Orphan Society, with the avowed purpose of bestowing charity upon them, that society can not recover.

3. An executed gift or gratuity can not be revoked by the donor.

4. "Infants who are invited, generally or specially, to a charitable institution can not be held bound for the charity they receive without an express promise to pay, simply because they happen to have and receive property which was unknown to the managers of the institution until after the performance of the charity."

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Hargis.

The appellant, a charitable institution for the rearing, maintaining and educating of orphan children, brought this action against John Schulten, as guardian of Frank, George, Catherine and John Wolpert, and against each of said infants in their individual capacity, for the value of raising, taking care of and educating them.

The petition, stripped of its formal parts, substantially alleges that the infants named were supposed by appellant and their guardian to be penniless, and that the appellant received, cared for and educated them as persons who have no property or means, and that such persons were so received and cared for without charge in the institution, but that the by-laws authorized by its charter provides that the guardian of orphans who have property, means or estate might contract with appellant's board of trustees and agree upon the conditions of their admission, and that appellant has recently discovered that the infant appellees did have some money which was received from their mother's estate, and as a pension by reason of the military service of their father in the United States army.

Whether the court below was correct in sustaining appellee's motion to compel appellant to elect which cause of action it would prosecute is the first assigned error for consideration.

This assignment is not sustained by the argument that this character of joint action will avoid a multiplicity of suits, and is, therefore, authorized by the rules of equity, because section 88, Civil Code, fixes the rule and prescribes what causes of action may be joined. And by its express letter only such actions as affect all the parties to the action may be joined.

The petition, if it stated any, sets forth four distinct causes of action against as many different parties, none of whom is interested in or can be affected by any cause of action alleged against anyone of the others.

While each has the same guardian, he represents their interest in as distinct a capacity officially as if each had a different person as guardian.

The debt or liability of one can not be recovered from or discharged by the property of another.

The motion to elect was, therefore, properly sustained.

After the appellant, under protest, elected to prosecute its action against the guardian of John Wolpert, the latter demurred and the court sustained the demurrer, and that ruling forms the next question to be determined.

It will be noticed that the appellant does not allege any promise or agreement with the guardian or the infants either for board, care or education, and having, from charitable motives, taken, raised and educated them without intending to charge therefor, as it alleges, it can not, by reason of this express and executed gratuity, recover on an implied assumpsit raised by law unless the alleged mistake in the condition of these orphans will authorize a revocation of its consent and impose upon them a liability for what it voluntarily did. It is not alleged that the guardian intentionally or fraudulently suppressed the knowledge from appellant of the existence of the small sum which they received by distribution from their mother's estate or of the pension, and a close analysis of the whole case presents the question whether a charitable institution, incorporated for the purpose, shall be permitted to receive, care for and educate orphans with the express understanding that nothing is to be charged therefor, and when it is discovered that such orphans have received, by the misfortunes of war and the charity of the government, a pension for the

purpose of subsistence, which is exempt from attachment, levy or seizure, revoke its gratuity and share with the beneficiaries that charity which they have received from another source.

We do not think it can be allowed this privilege of recantation, because its charter and by-laws authorized it to contract for compensation, yet it failed to arm itself with an agreement therefor, and no deception is alleged to have been practiced to prevent this exaction.

And it has been held, too often to admit of doubt or discussion, that an executed gift or gratuity can not be revoked by the donor, no matter what may have been the condition of the donee, or what charities he shall receive or property acquire in the future unless the donation or gratuity were the result of fraud or mistake in its execution.

And there is no reason why an executed gift of personal property shall not be revoked that does not sustain the irrevocability of gratuitous labor, care, board or education after completion.

One is no more the executed donation of value than the other, and the same principle of law is equally applicable to both.

The creation of the appellant was for charitable and benevolent purposes, and the undertaking of its holy mission presupposes that its labor of love is to be done without money and without price, and unless a special agreement, which seems to have been authorized by its charter, in view of the gratuitous nature of the office of this institution, were made for compensation, we do not think it can recover for board, care and education of orphans whose control it has sought with the avowed purpose of bestowing charity upon them.

There was no mistake in the execution of these charitable donations, which do not partake of the nature of a contract to the same degree that ordinary gifts do, but the object of their charity seem to have been less needy than appellant supposed, and this is all we are authorized to infer from the allegations of the petition.

Under what is known as the hospitality act an uninvited guest can not be held liable on an implied assumpsit, and cer-

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tainly infants who are invited generally and specially to a charitable institution can not be held bound for the charity they receive without an express promise to pay, simply because they happen to have and receive property which was unknown to the managers of the institution until after the performance of the charity.

Were this otherwise this noble charity would be converted into a sort of house of private entertainment, to which obligations of indebtedness might be contracted unawares by orphans and guardians, and those who receive its assistance free would become debtors therefor by the unexpected development of ownership hitherto unknown to the institution.

The demurrer, in our opinion, was properly sustained. Judgment affirmed.

R. J. Elliott for appellant.

Byron Bacon for appellees.

LOUISVILLE & NASHVILLE R. R. CO. v. WOLFE.

(Filed February 16, 1882.)

1. For negligently permitting a hole to be in the depot platform, wherein the plaintiff fell in broad daylight and broke his knee cap, the plaintiff recovered a judgment for \$2,000 against the railroad company, which is affirmed in this case.

2. What is negligence and how it may be pleaded—

"Negligence is the ultimate fact to be pleaded, and it forms part of the act from which an injury arises, or by which contributory negligence is made out.

"It is the absence of care in the performance of an act, and is not merely the result of such absence, but the absence itself, and it is not, therefore, a mere conclusion of law, and may be pleaded generally."

Facts constituting contributory negligence as set out in the answer, and the reply thereto, are fully set forth in the opinion herein.

Appeal from Christian Circuit Court.

Opinion of the court by Judge Hargis.

It is alleged in substance by the appellee that there was a hole in the platform connected with appellant's depot; that the opening and its dangerous character were known to the appellant, but it negligently, wantonly and wilfully failed and refused to repair it, and while removing a box of freight from said depot to his wagon, having necessarily to pass over

said hole, he fell into it and broke the left patella or knee cap of his leg, for which he prayed damages.

From a judgment upon a verdict of \$2,000 in favor of appellee the appellant prosecutes this appeal and raises the question, first upon the pleadings, that the facts constituting contributory negligence which it pleaded were not denied, and, therefore, no verdict or judgment should have been rendered in appellant's behalf.

The allegation of the answer is, "that the plaintiff had full knowledge of said defect, and with his eyes wide open, and in broad daylight, walked into said hole, and by his own negligence contributed to said injury, and thereby he alone is responsible for his misfortune."

To this the appellee replied that "the plaintiff, Wm. R. Wolfe, for reply to defendant's answer, denies that he was guilty of any negligence at or before the time of the injury complained of in his petition, or that he contributed in any way by his negligence to the occurrence of said injury. He denies that defendant is relieved from responsibility for their gross and willful neglect by reason of any negligence on the part of the plaintiff."

It is contended by the counsel that the reply fails to deny the substantive facts constituting contributory negligence, and only traverses the averment of negligence, which is but denying a legal conclusion.

The error in this position lies in the assumption that the allegation of negligence is a mere legal conclusion, and that the supposed substantive facts constitute contributory negligence, neither of which is true.

Negligence is the ultimate fact to be pleaded, and it forms part of the act from which an injury arises, or by which contributory negligence is made out. It is the absence of care in the performance of an act, and is not merely the result of such absence, but the absence itself, and it is not, therefore, a mere conclusion of law, and may be pleaded generally. Although the appellee, with his eyes open and in broad daylight, walked into the "hole," these facts alone would not constitute neglect; but if done intentionally or negligently they would do so. Nor does the fact that the appellee knew the "hole" was in the

floor, when added to those named, constitute negligence, as want or absence of care must be averred in some form, as it is one of the essential facts necessary to such a defense.

The issue formed by the reply was material. (42 Iowa, 378; 34 Mo., 285; 14 N.Y., 310; Bliss on Code Pleading, section 211.)

It is urged that the proviso to the second instruction was erroneous, because the defendant could not have been required to use ordinary care or held to responsibility for a failure to do so unless it failed to use such care after being aware of plaintiff's danger.

Many authorities are cited to sustain this view, but none of them are applicable to the state of facts before us. When an accident or injury has been caused by the concurring and approximately simultaneous fault of both parties, neither can recover from the other unless the latter, after being aware of the peril, could, by the exercise of ordinary care, have avoided the injury, or the neglect was either willful or gross.

But in this case the facts admitted by the pleadings, and clearly established by the evidence, show that the appellant had, by its original act of negligence in permitting the opening in the floor to remain out of repair, rendered it impossible for it or its agents, who were not present, to become aware of appellee's peril in time to avoid the injury to him. And it was, therefore, correct to instruct the jury that the ordinary care requisite to avoid the injury must have been exercised by the appellant with reference to the original and continuing act of negligence which existed before and was the proximate cause of the accident by which appellee's knee-cap was broken and his leg injured.

These views obviate the necessity of discussing instruction No. 4, which was asked by appellant and refused by the court, as it is opposed to the exposition of the law given in this opinion.

The third instruction confines the jury strictly to compensatory damages, and we have not been shown any error, even in its verbiage, and certainly not in the law embraced by it. As to the first instruction, no objection was made or exception taken to it, and it was given at the instance of appellant, whose criticism of it can not, therefore, be considered by this court.

We may suggest, however, that the clause objected to refers to negligence generally and not to any special kind of negligence, and says: "It (negligence) may be gross or wanton and yet not intentional." This seems to be correct, and what the instruction really means.

Wherefore, the judgment is affirmed.

Feland & Seabee and Wm. Lindsay for appellant.

Petree & Littell for appellee.

ANDERSON, &c. v. HALL'S ADM'R, &c.

CRAWFORD v. SAME.

(Filed February 16, 1882.)

1. Devise to widow of "real and personal estate, * * * giving her the right to sell and re-invest as she may desire any part of the same for her separate use and benefit, and at her death I desire any portion of my estate undisposed of shall go to my three daughters," created a life estate remaining in the widow, with power to sell and re-invest, and remainder after her death to pass to his three daughters.

2. Words of inheritance are not necessary to create a fee simple estate, and unless the deed or will expresses a different intention the estate will be absolute. (Section 7, article 1, chapter 63, General Statutes.)

3. The intention of the grantor or deviser must be ascertained from the express words or necessary inference resulting from their use.

4. A life tenant may be invested with power to sell and to use so much of the principal as might be necessary to maintain him—

But the life tenant had no power, in this case, to give the estate to another or to waste it for the purpose of depriving the remaindermen of their interest.

5. The life estate in this case was a trust invested in the widow for those in remainder, subject to her right to use the property for her support and maintenance during life.

Property purchased by the life tenant in her own name, and paid for partly out of the life estate fund, at the termination of the life estate passes to the remaindermen, subject to the liens created on it by the life tenant for purchase money due thereon, or borrowed by her and paid thereon.

The remaindermen are entitled to the amount of the trust fund invested, with interest from the institution of the action, or to the joint benefit of the purchase, to the extent of the respective funds invested; and if there should be any surplus after paying the liens and remaindermen, such surplus should be apportioned between the heirs of the life tenant and the remaindermen in proportion to the amounts in estate.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

Bartlett M. Hall died in the county of Shelby, leaving surviving him his wife and several children. He had been twice married, but left no children by his last wife. He made and published his last will and testament as follows:

By the first clause he directed the payment of his debts. The second clause provides: "I give and bequeath to my beloved wife, Mary F. Hall, all my property, including real and personal, of any and every description whatever, giving her the right to sell and reinvest as she may desire any part of the same for her own separate benefit, and at her death I desire that any portion of my estate remaining undisposed of shall go to my three daughters, Mary Davis, Annie Harbison and Amelia Wilson." The third clause provides: "I have given to my boy, Wm. Hall, and my daughter, Valinda Nuckole, more than I am able to give the rest of my children; therefore, I give nothing more to them." And in the last clause he says: "I have given to Mary Davis and Annie Harbison more than I have given to my daughter, Amelia Wilson, and after the death of my wife, Mary F. Hall, I wish Amelia Wilson to first be made equal, and so with each of the other two, Mary Davis and Annie Harbison. I desire that they should come in for their proportion equally, after what they have already received be counted to them and taken into consideration, my object being to let each of these three daughters, Mary, Annie and Amelia, share alike and get all my estate remaining after the death of my wife, and after each one of them have accounted for the portion already received," etc. He left his wife sole executrix, who qualified as such, and undertook the execution of the trust. The only estate of much value left by the deviser was a tract of land in the county of Shelby, containing about 180 acres. The farm was sold by the widow and executrix, and after applying the proceeds to the payment of the debts of her husband, she had remaining near \$7,000. The widow owned no estate as far as this record shows, except such as was derived under the will of her husband.

It appears from the record that this money she invested in notes upon D. A. Meriwether, and the latter becoming insolvent, his property was sold by an assignee, and the devisee, for

the purpose of saving the estate and securing her investment, purchased the house and lot in controversy. Some of the purchase money due by the widow remains unpaid, and constitutes a lien upon the property; also a mortgage lien of \$800 due Mrs. Anderson. This was borrowed to pay on the property, and whether so or not, both the lien note for the purchase money and the mortgage debt are to be satisfied as against these claimants. The lot of ground purchased of the assignee of Meriwether by Mrs. Hall was at a cost of \$8,000, of which sum she paid \$1,000 in cash, and for the balance executed her notes. The widow died in July, 1879, leaving as her only heirs a sister and brother surviving, viz.: John Crawford and Kate Anderson. This controversy is between the heirs of Mrs. Hall (the widow) and the children of B. F. Hall by his first wife, each claiming the lot of ground purchased by Mrs. Hall of Meriwether's assignee. The conveyance was made by the assignee to Mrs. Hall in her own right, and for the purchase money unpaid she executed her individual notes, and, as the proof conduces to show, borrowed of Kate Anderson the \$800 secured by the mortgage to enable her to pay for the property. It is also, we think, well established that all the payments made on the property, except the \$800, were from means derived originally from the sale of the tract of land owned by B. F. Hall, and the same directed to be sold by his widow, who was also his executrix. The appellants, who are the heirs of Mrs. Hall, claim that, by the second clause of her husband's will, she was invested with an absolute estate in all the property of the husband, both real and personal, and, therefore, his children by his first wife have no interest in the land or its proceeds. The children maintain that the widow had only a life estate, with the right to use such of the proceeds of the estate as might be necessary for her comfortable support. Under our statute words of inheritance are not necessary to create a fee simple estate, and unless the deed or will expresses a different intention the estate will be absolute. Section 7, article 1, chapter 68, General Statutes (similar to the Revised Statutes), provides, "unless a different purpose appears by express words or necessary inference, every estate in land, created

by deed or will, without words of inheritance, shall be deemed a fee simple, or such other estate as the grantor or testator had power to dispose of." So in changing the common law rule in regard to the title to land by deed or will we are left by the statute to ascertain the intention of the grantor, either from the express words of the instrument or the necessary inference resulting from their use. Adopting this rule of construction, we have but little difficulty in arriving at the purpose of the testator from the express language used by him in his will, and if not, his intention is so manifest in each and every provision of that instrument as to leave but little room for construction. The second clause of the will provides: "I give and bequeath to my beloved wife, Mary F. Hall, all my property, including real and personal, of every description whatever, giving her the right to sell and reinvest, as she may desire, any part of the same for her own separate use and benefit, and at her death I desire any portion of my estate remaining undisposed of shall go to my three daughters, Mary Davis, Annie Harbison and Amelia Wilson."

Then follows the third and fourth clause of the will, in which the testator says that he has given two of his children, Wm. Hall and Valinda Nuckols, more than he is able to give the rest of his children, and proceeds to say that he had given to Mary Davis and Annie Harbison more than he had to his daughter, Amelia Wilson, and provides: "After the death of my wife, I wish Amelia Wilson to be made equal, and so with the other two, my object being to let each of these three daughters, Mary, Annie and Amelia, share alike, and get all my estate remaining after the death of my wife."

The testator was disposing of his entire estate, and the first object of his bounty being his wife, his plain purpose was to make a liberal provision for her, by giving to her his entire estate for life, with the power to sell and reinvest any part of the same for her own use and benefit, and any of his estate remaining undisposed of at his wife's death to pass to his three daughters. The words "for her own separate use and benefit," were evidently intended to exclude the idea that his children or any one child should exercise any power or control over the estate during the life of his wife, and that she might sell and reinvest for her own exclusive use, not to acquire an abso-

lute estate, but for her separate use and benefit during life. If the testator intended, in the first place, to give his wife the absolute fee, but few words were necessary to express that desire; and if he intended that she should sell and reinvest, and then become the absolute owner of the estate in which the proceeds were invested, it was idle to have made any provision for his daughters, as she could at once, as she seems to have done, sell the entire estate, and by investing the proceeds deprive the children of any interest in it. Such was not the purpose of the testator, and the power given his wife to sell and reinvest the proceeds negatives the idea that he intended to give her any greater estate than for life, either in the property devised or in the proceeds of that property when invested. The words, "the estate remaining undisposed of shall go to my three daughters," follow directly after the power to sell and reinvest; and while the right to use and dispose of the estate by the wife for her comfortable support may not be limited to the income, it is manifest that this testator thought he was making some provision for his children, and doubtless would have been surprised if, after writing his will, he had been told that all the care taken with reference to the advancements he had made to each of his children, and his desire that the others should be made equal, amounted to nothing, as he had given to his wife in fee simple the entire estate. He had confidence in his wife, and believed that she would use no more of his estate than was proper and necessary for her own maintenance. We see no reason why a life tenant may not be invested with the power to sell and with the additional power to use so much of the principal as might be necessary to maintain him. We do not construe this will as giving to the wife an unlimited dominion over the estate. She had no power to give it to another, or even to waste it in extravagance for the purpose of depriving these children of their interest in it. This is not the case of an absolute gift or the devise by the testator of an estate in fee to the wife, and then an attempt to defeat the devise by a limitation over.

If we assume that an absolute estate was devised to the wife, or that the devise to her is inconsistent with that to the chil-

dren, there might be room to question the right of recovery on the part of the appellees. The real question is whether the express language of the will, or necessary inference from it, leads to the conclusion that the testator intended to create a less estate in his wife than a fee simple. We are aware of the importance attached to words of inheritance used in a deed or will in determining the character of title acquired, but in a case like this, as in fact in all wills, the intention of the testator must have a controlling influence; and to determine that the devise to the wife in the will before us is inconsistent with the devise to the children would be to defeat the plain intention of the testator expressed in each sentence of the will, and give the proceeds of his land to those who are strangers in blood and without claim upon his bounty.

In the case of *Carroll's Heirs v. Carroll's Heirs*, 12 B. Monroe, —, the testator made the following devise to his wife: "I give and bequeath to my beloved wife, Priscilla Carroll, the land on which I now live, and all other land I now have or may have hereafter; also all my slaves and stock of all kinds, etc., including all my estate, both real and personal. But should she and my sons see proper to dispose of any part of any kind they are at liberty to do so, and apply the proceeds thereof amongst my children hereinafter named as may seem to them just and equitable." By a codicil to this will the testator says: "In addition to what is bequeathed to my wife, she and my executor is hereby authorized to sell and dispose of any of my real and personal estate they may think proper, and that my wife have as much of the proceeds of such sale as she may desire for her own use and benefit, and the overplus, if any, to be applied as I have directed in the first part of my will on the subject."

The same argument for the appellants was made in that case as in this, and it was held that the wife took an estate for life only, the court saying that the statute changing the rule of construction did not preclude the question from arising upon wills which contain an indefinite devise without words of limitation, whether an estate in fee simple passes to the devisee or only an estate for life. At common law a devise of real estate without words of inheritance gave to the devisee an es-

tate for life only, and now by our statute an indefinite devise, without words of limitation or of inheritance, will pass a fee simple estate; but at last, as said by this court in the case cited, "the effect of such a devise still depends upon the intention of the testator, to be gathered from his whole will, according to the settled rule of legal construction."

In the case of *Smith v. Bell*, in 6 Peters, —, the testator made the following devise: "I give to my wife, Elizabeth Goodwin, all my personal estate, whatever and wheresoever, and of what nature, kind and quality soever, after payment of my debts, and which personal estate I give and bequeath unto my said wife, to and for her own use and disposal absolutely, the remainder after her decease to be for the use of James Goodwin."

Chief Justice Marshall for the court said: "It is impossible to mistake the intent. The testator unquestionably intended to make a present provision for his wife and a future provision for his son. The first and great rule in the construction of wills is that the intention of the testator expressed in his will shall prevail if consistent with the rules of law." The son took the personal estate left at the death of the mother.

The power of disposition in the case before us was only for the purpose of reinvestment, but if construed otherwise, and as being given for the purpose of enabling the wife to use the principal of the estate in the event her necessities demanded it, and still the children would be entitled to the estate remaining, whether of the original estate or the estate in which it had been invested to the extent of the investment made. This construction harmonizes each provision of the will, and effectuates the intention of the testator to provide for both his wife and children. It was a trust vested in the wife for those in remainder, subject to her right to use the property for her support and maintenance during life.

We are not disposed, however, to adjudge that the children are entitled to the property after satisfying the liens upon it created by the widow. She purchased this property in her own right, gave her individual note for the purchase money, and borrowed \$800, secured by mortgage on the property, to enable her to make the payments. It is proper to state that she

made no effort to conceal the extent of the investment made of the money received from the sale of her husband's property, but, on the contrary, she said they should have the investment, although the deed is made to her in her own right. The appellees have traced the investment into this property, but their money did not purchase the whole of it, and there is no charge of bad faith against the life tenant. The property cost \$3,000. The mortgage was \$800, and the balance of the purchase money, evidenced by the note of Mrs. Hall due Ballard, is near \$350. Take these sums from the original cost of the property, and it will show the amount of the trust fund invested in it. The appellees are either entitled to the amount of the trust fund invested, with interest from the institution of the action, or, if the purchase is to be treated for the joint benefit of the parties, that is, each entitled to the extent of the sum invested, the land should be sold first to satisfy these liens, and then the amount of the investment made out of the trust fund; and if there is any surplus money arising from the sale it must be apportioned between the heirs of the life tenant and these children in proportion to the amount invested by them in the original property, and the rents, if any, accruing since the death of the life tenant to be apportioned in the same way. Mrs. Hall had invested, so far as these appellees are concerned, the mortgage debt and the purchase money due on the purchased property. This is paid to the parties to whom she executed her notes. The amount of the trust fund being also paid, the surplus remaining should be apportioned in proportion to the amount invested. This seems to us to be the equity of this case. The judgment below is reversed and cause remanded for proceedings consistent with this opinion. The cost will be taxed as if there was one appeal.

John C. Walker and Goodloe, Roberts & Humphrey for appellants.

Caldwell & Harwood and Beattie & Winchester for appellees.

MEDLOCK, &c. v. SUTER, &c.

(Filed February 16, 1882.)

1. Possession of land under a parol purchase thereof from a married woman and her husband was adverse to her, her husband and her heirs, from the time such parol vendee or his widow and heirs took possession under such parol purchase.

2. Thirty years' continuous, adverse possession of land, under a parol purchase thereof from a married woman and her husband, bars an action to recover the same brought by the heirs of such married woman, although the parol sale was void as to her, and she was a married woman at the time the right to bring the action for the recovery of the land first accrued.

In this case the land was conveyed to the married woman and her husband in 1835 by the heirs of her father in the division of his estate. The husband and wife, by parol contract, sold the land in 1842, and the widow and heirs of their parol vendee took possession thereof in 1842. The husband made a deed to them in 1846, after the death of his wife. The heirs of the wife commenced this action in 1873, after the death of the husband.

3. The acceptance of a deed by parties in adverse possession of land, conveyed in the deed, did not change the character of their possession, or convert them from adverse to amicable holders, or stop the statute of limitation from running in favor of such adverse holders.

Appeal from Owen Circuit Court.

Opinion of the court by Chief Justice Lewis.

In 1835 John T., Tinsley M. and Martha Snelson, children and heirs of Bartlet Snelson, deceased, conveyed to their sister, Elizabeth Medlock, and her husband, G. C. Medlock, fifty acres of land, reciting in the deed that in the division of lands of their father that tract fell to her lot as one of the children.

In 1842 Medlock and wife, as appellees contend, sold the tract by parol contract to her brother, Tinsley M. Snelson, who paid part of the purchase price, but died the same year, before paying the residue or taking possession of the land.

After his death Medlock and wife removed from the land, and, appellees contend put Tinsley M. Snelson's widow and children in possession under the purchase, who have held it ever since—the widow until her death in 1872, and appellees, Matilda Suter, the only living child of Tinsley M., and her husband, W. H. Suter, since that time.

January 15, 1845, G. C. Medlock, his wife having died in the fall of 1843, conveyed the land to the children and heirs of Tinsley M., reciting in the deed that the consideration for the

conveyance was \$1,500, part of which was paid in the lifetime of their father, and the balance was paid by his administrator.

In 1850 G. C. Medlock removed to the State of Missouri, and died there in 1864 or 1865.

This action was brought on the 15th of February, 1878, by the heirs at law of Elizabeth Medlock for the recovery of the land, and is before this court by appeal from the judgment of the lower court dismissing the petition.

Various grounds are relied upon by appellees in support of the judgment. But it is not necessary to consider any other than limitation.

Section 4, article 1, chapter 71, General Statutes, is as follows: "The period within which an action for the recovery of real property may be brought shall not in any case be extended beyond thirty years from the time at which the right to bring the action first accrued to the plaintiff, or the person through which he claims, by reason of any death, or the existence or continuance of any disability whatever."

This court, in the case of Conner and Wife v. Donner, &c., 4 Bush, construing section 5, article 1, chapter 43, Revised Statutes, which is identical with the section quoted, used the following language: "Conner and wife having the right of immediate entry and possession upon the death of Mrs. Conner's mother, of course the possession of their father and his vendee under the decretal sale was adverse to them, and though she was a feme covert and under disability, yet this can not protect her for more than thirty years under the recited statute. * * * The legislative policy is to quiet all titles, notwithstanding disabilities, after thirty years' adverse possession; or, in other words, permits disabilities to prevent a bar by lapse of time for only thirty years."

According to the statute thus construed it is plain that if the widow and children of Tinsley M. Snelson entered upon the land and held the continuous, adverse possession, claiming under him for thirty years previous to the commencement of this action, the plea of limitation must avail appellees, although at the time the right to bring the action for the recovery

of it first accrued, Elizabeth Medlock, under whom appellants claim, was a married woman.

It, therefore, becomes necessary to determine, first, when they did enter and take possession; and, second, what was the character of that possession?

Though there is some controversy as to the precise time Medlock and wife left the land and they entered, two or three witnesses state it was sometime during the year 1842, and they are corroborated by the record of the county court of the county in which the land lies. Under an order of that court made in January, 1843, commissioners were appointed to divide the lands of Tinsley M. Snelson and allot dower to his widow. And at the February term of 1843 of that court their report was filed. From that report it appears that the fifty acres now in contest was treated as part of his estate; was surveyed and actually allotted by them to his widow as dower. We think it may, therefore, be taken as established that the widow and children of Tinsley M. Snelson took possession of the land sometime during the year 1842, or at least previous to the 15th of February, 1843. And if so, more than thirty years elapsed from the time such possession was acquired until the action was commenced.

What was the character of the possession, or, in other words, when did the right to bring an action for the recovery of the land first accrue to Elizabeth Medlock, if ever?

That the possession by the widow and children has been continuous and uninterrupted from the time they first entered until the bringing of this action is undisputed. And that they entered and held under the purchase made by Tinsley M. Snelson is also shown.

Although it does not clearly appear that Elizabeth Medlock received any part of the purchase price, it does appear that she united with her husband in selling the land to her brother, and after he died possession was given in pursuance of that sale to the widow and children, with her knowledge and consent.

But whether she united in and consented to the sale, and in putting the widow and children in possession in pursuance of it, is not material, except in determining as a question of fact whether the possession was as to her adverse or amicable. For,

according to the only proper construction that can be given to the statute, it began to run at the time the right to bring the action first accrued to her, or from the time the holding adverse to her began. Otherwise, her disability of coverture would serve to extend the period in which the action might be brought beyond thirty years. But we do not mean to be understood as deciding that the statute would have run against her or her heirs at law, if appellees had entered and claimed under a purchase of the life estate of her husband only. In this case there was no purchase of the particular estate of her husband, nor was the entry made under such purchase; but it was from both, and the possession was adverse to both, or neither.

Though the sale was, as counsel for appellant contends, absolutely void as to her and ineffectual to pass her title, it does not necessarily follow that the possession under it was amicable. For, as has been held by this court in the case of *Hickman v. Owens*, MS. opinion, September, 1880, "an entry under a parol contract may be a disseisin, and the possession may ripen into a title," and under the thirty-year statute the fact of the vendor being a married woman would make no difference.

But it is contended that the possession being in this case under an executory contract was, in contemplation of law, the possession of Mrs. Medlock and those claiming under her, and that no lapse of time will bar them. Though a contract may be executory, and the entry of the purchaser, as in the legal character of a tenant at will or quasi tenants, still he might hold adversely in fact. (*Robertson v. Miller*, 2 B. M., 283.)

A tenant or quasi tenant may, by his own act, not only dissolve the relation of landlord and tenant, but render his possession adverse (*Farron v. Edmonson*, 4 B. M., 650; *Bedford v. Thomas*, 6 B. M., 832). And whenever he disclaims holding as tenant the right of action immediately accrues to the vendor, no notice to quit being necessary. (*Ross v. Garrison*, 1 Dana, 36.)

And even under a parol contract of purchase "when a man holds and cultivates land as a purchaser, he holds and cultivates it as his own, and not as the land of his vendor." (*Richmond & Lexington T. R. v. Rogers*, 7 Bush.)

Whether the possession be considered as held under a contract of sale that was void, and consequently without color of title, or under an executory contract, and, therefore, in legal contemplation, the possession of Mrs. Medlock and those claiming under her, we are of the opinion that if in fact the widow and children of Tinsley M. Snelson entered under the purchase made by him, and held the actual, open possession of the land, using and claiming it for and as the land of his children and heirs at law, such possession was adverse, and the right to bring an action for the recovery of it thereupon accrued to Elizabeth Medlock.

That the widow and children of Tinsley M. Snelson did so enter, occupy, use and claim the land as their own, with the knowledge of Mrs. Medlock and her husband, we think is clearly shown by the evidence. As, therefore, the right to bring this action accrued more than thirty years before it was commenced, appellants are barred by limitation.

But counsel for appellants contend that appellees, having accepted the deed from G. C. Medlock, made in 1845, must be presumed to hold and to have held under it, and that limitation did not commence to run against his wife or his heirs until his death.

This is upon the assumption that he held only a life estate in the land. But we do not consider it necessary to decide whether he held and conveyed by that deed only a life estate, or as survivor of his wife acquired the fee, because, in our opinion, the acceptance of the deed by the widow and children did not have the effect of changing the character of their possession, or to stop the running of the statute of limitation against Mrs. Medlock and those claiming under her.

Wherefore, the judgment is affirmed.

A. P. Grover, H. P. Montgomery and A. Duvall for appellants.

Geo. C. Drane for appellees.

March, 1882—4

SAWYER v. GUSCUTH, &c.

(Filed February 18, 1882—Not to be reported.)

1. In an equitable action by the owner of a particular estate of freehold in possession against the infant owner of the reversion or remainder, real property may be sold for investment of the proceeds in other real property.

2. In an action by a guardian against his ward the proceeds of the infant's real estate may be diverted from the investment in other real property and applied, so far as necessary, to the maintenance and education of the infant.

3. The infant must be served with process before the proceeds of his real estate can be applied to his maintenance and education, by diverting them from investment in other real property.

4. The mother, upon whom process was served for the infant defendants, was herself the plaintiff, and the service of process consequently defective. Process should have been served upon some other person not interested, as indicated in section 52 of the Civil Code.

Appeal from Daviess Circuit Court.

Opinion of the court by Chief Justice Lewis.

Under section 491, Civil Code, in an equitable action by the owner of a particular estate of freehold in possession against the owner of the reversion or remainder, though an infant, real property may be sold for investment of the proceeds in other real property.

Under that section this action appears to have been brought by the owner of the particular estate, being the mother of the infant defendants. But in her petition she asks that the value of her interest be paid in money directly to her, and the remainder be invested in a house and lot for herself and children, the title being taken to them.

Subsection 3, section 489, authorizes, in an action by a guardian against his ward, a sale of the estate of the ward for his maintenance and education. And subsection 5, section 489, authorizes in such an action a sale of the estate of an infant and investment in other property.

Notwithstanding, by the terms of section 491 as well as subsection 5, section 489, the proceeds are required to be invested in other real property, and the purpose of the legislature seems to be to preserve the fund intact, still we are of the opinion that under the authority given by subsection 3, section 489, as well as under the inherent power belonging to the chancellor, such portion of the proceeds belonging to the infant arising from the sale under the proceedings of either the other two

sections as may be necessary for his education and maintenance may be diverted from the investment and applied to such necessary purposes.

But it is only in actions by the guardian against his ward that the proceeds of the infant's estate can be applied for his maintenance and education.

While the action authorized by section 491 may be brought by the owner of the particular estate, the actions authorized by subsections 8 and 5, section 489, must be brought by the guardian. And whether brought by the one or the other the infant must be served with process, as required by section 52, Civil Code.

As the mother, upon whom the process upon the original petition was served for the infant defendants, was herself the plaintiff, it would seem that the spirit of the Code was not complied with. The process, she being plaintiff, should have been served upon a guardian or other person described in section 52 not interested.

Though the pleading subsequently filed by the statutory guardian, Burton, was denominated a petition and answer, it was substantially a cross action against the infants seeking a sale of their estate for their maintenance and education, and being necessary party defendants thereto, they should have been made so, and served with process. As this was not done, the court had no authority to order a sale of their estate.

Though the first judgment was void, and the sale under it was properly set aside, the action was not necessarily discontinued. But being upon the docket, it was not improper for the court to permit the pleading filed by Burton, the guardian. And if at the time the second judgment was rendered the infant defendants had been before the court the sale would have been valid, for in every other respect the law was substantially complied with.

But for the reason stated the judgment of the court below, directing a sale of the property and overruling the exceptions filed by appellant, must be reversed for further proceedings consistent with this opinion.

Weir, Weir & Walker for appellant.

W. N. Sweeney & Sons for appellees.

EXCHANGE AND DEPOSIT BANK OF OWINGSVILLE v.
STONE.

WHITNEY v. STONE, &c.

(Filed February 21, 1882.)

1. By electing to take a life estate in 169 acres of land devised to her by her husband, which 169 acres included 100 acres which had been conveyed to her husband and herself in 1814, the widow abandoned her right to claim 100 acres by survivorship.

That she also elected is shown by the fact that she sold and conveyed her life estate in the 169 acres.

2. After the termination of the life estate each remainderman took an undivided interest in the 169 acres.

3. Remaindermen selling their respective undivided interests in the 169 acres, and retaining liens thereon for purchase money, had each a lien upon his respective interest in the whole 169 acres, so that neither of them could enforce a lien upon any particular portion before division.

4. Purchasers of different parcels of a tract of land, all of which is subject to prior incumbrances or liens, should contribute ratably to remove such incumbrances or liens, after first exhausting the residuum, if any, remaining in the hands of their vendor.

The first purchaser has no advantage of subsequent ones in such cases—

In apportioning the burden between such purchasers the value of their respective parcels at the time of the foreclosure should be the criterion.

5. The assignee of a note secured by lien on land, sold by executory contract, can not be deprived of his lien without his consent by his assignor conveying the land and fraudulently, or by mistake, omitting to retain a lien in the deed to secure the note.

The lien of the assignee in such a case is preferred over the right of an assignee in bankruptcy of the vendee.

6. Assignee in bankruptcy takes the property of the bankrupt subject to all legal and equitable claims of others, which might have been asserted against the bankrupt.

Assignees in bankruptcy are not innocent purchasers for a valuable consideration, in the same sense as are ordinary purchasers for value without notice. They hold the estate of the bankrupt just as the bankrupt held it, subject to equitable or legal liens.

Appeal from Bath Circuit Court.

Opinion of the court by Judge Hargis.

In 1814 Valentine Stone conveyed to Charles and Matilda Stone jointly a tract of land containing one hundred and three-fourth acres.

Subsequently Charles bought several smaller tracts adjacent to it and treated them as one farm, and when he died in 1840 it contained 169 acres, 1 rood and 8 poles.

By his will he devised all of his real estate to his wife, Matilda, for life, remainder in fee equally to his ten children.

One of his sons, L. M. Stone, had become the owner, by devise and bargain, of eight-tenths in fee of the whole of the farm, when his sister, Jane, died 1864, childless, leaving Matilda, her mother, and eight brothers and sisters as her heirs at law, who inherited one-ninth each of her share.

On September 1, 1869, L. M. Stone purchased from John F. Stone his undivided one-tenth in the farm and his one-ninth of one-tenth which he inherited from Jane, a lien being reserved for the purchase money.

Thereafter Matilda Stone died intestate the owner of one-ninth of one-tenth inherited by her from Jane, leaving said eight brothers and sisters as her only heirs.

After Matilda's death L. M. Stone bought, by executory contract, his sister, Mrs. Moore's, share, it being one-eightieth which she inherited directly, and through her mother, from Jane, for which it does not appear that he paid.

He also purchased and paid for a similar interest of James Stone.

His sister, Fannie, who married — Whaley, died, leaving four children, who were each entitled to one three hundred and twentieth, derived from Jane and their grandmother, Matilda.

From them he purchased their interest, paying Richard and Artemesia in full, but failing to pay John S. Whaley and Amanda for their interests by \$66.44, which was a lien upon them.

His sister, Caroline, died, leaving one child, who intermarried with Rawlings, by whom she had two children, and died.

He bought the interest, being one one hundred and sixtieth of one of them, on which he paid all but \$35, that remained a lien on that interest.

With his title in that state and the whole farm, subject to the liens named, in his possession, he having added thereto five acres by purchase from Thompson, conveyed, on the 15th of October, 1869, 14 acres, 3 roods and 21 poles of it to Mrs. Ellen Wilson, and 41 acres, 3 roods and 19 poles thereof to George Whitney, and on the 7th of September, 1874, sold the remainder, supposed to contain 121 acres, to Wesley Whaley,

by written contract, in consideration of \$70 per acre, \$3,000 thereof to be paid October 25, 1874; 2,000 July 1, 1875; and the rest December 25, 1875. It was agreed in the writing that in case the title to some small portions of the land could not be made, Whaley was to retain the purchase price therefor at 6 per cent. from July 1, 1875, until the title should be completed, and that either party might survey the land.

On the 27th of the following October Whaley paid \$3,000 and executed his note to L. M. Stone for the land, as follows: \$2,000, due July 1, 1875; \$1,091.17, due December 25, 1875; and \$2,479.95, due December 25, 1875.

Stone assigned the two notes first named to the appellee, Brown, and the last named note to the bank, which is appellee on the original appeal, and has also prosecuted an appeal on the same record.

In June, 1875, the land was surveyed and found to contain 117 acres, 2 roods and 22.70-100 poles instead of 121 acres, and on the 1st of July Stone conveyed it to Whaley, reciting in the deed the consideration to be \$8,284.93, that \$5,000 thereof was paid in hand and \$3,284.93 was "to be paid on the 25th of December, 1875," and shortly thereafter died.

August 15, 1876, the bank brought suit on the note held by it against Stone's administrators, Whaley and Brown, seeking to enforce a lien on the land therefor.

In September following John F. Stone brought his action on a note for \$857.53, executed to him by L. M. Stone in consideration of his interest in the land conveyed as above set forth.

These actions were consolidated and all the parties in interest brought before the court.

It appears at the institution of these actions L. M. Stone had not paid the purchase money due to John F. Stone, John S. Whaley, Amanda Lancaster, nee Whaley, and H. H. Rawlings; nor had he received a conveyance from Mrs. Moores or paid her for her one-eightieth interest; nor had he purchased either of the interests of M. R. and P. R. Stone, which they derived from Jane and their mother; nor had he purchased the one hundred and sixtieth interest of Thomas Rawlings; nor had he bought the one seven hundred and twentieth interest of John

F. Stone, which the latter inherited from his mother after the sale and conveyance of his interest as stated.

By sufficient pleadings the questions now raised by the numerous appellants were presented to the chancellor, and he adjudged that the liens of John F. Stone, John S. Whaley, Amanda Lancaster and H. H. Rawlings and the interests not conveyed of P. R. Stone, M. S. Stone, Mary Moores and Thomas Rawlings should be, as incumbrances, apportioned upon the whole tract of 169 acres, 1 rood and 8 poles, and be borne by L. M. Stone's vendees in the following proportions, to wit: Whaley, 18008-27088; Whitney, 6699-27088; and Mrs. Wilson's heirs 2381-27088.

Of that judgment the appellants complain, and the two appeals will be considered together.

We will not examine each assignment of error in detail, as many of them are but the statement in a different form of the vital questions which are necessary to be decided.

The order best suited to the chronology and our analysis of the case will be pursued.

It is insisted by counsel for the bank on its appeal that Matilda Stone was vested by the deed of Valentine Stone, which was inseverable estate, and as the survivor of her husband she was entitled to the one hundred and three-fourth acres embraced by the deed.

It was clearly and unmistakably held by this court before the adoption of the revised statutes that absolute and unequalled conveyances of real estate to husband and wife made them tenants by the entirety, and that neither could so alienate the estate during coverture as to affect the right of the survivor to it. This doctrine is that of the common law, which is based upon the legal unity of husband and wife. (*Rogers v. Grider*, 1 Dana; *Ross v. Gamson and Wife*, 1 Dana; *Babbitt, &c. v. Scroggins, &c.*, 1 Duvall; *Croan, &c. v. Joyce, &c.*, 3 Bush; *Elliott, &c. v. Nickolls, &c.*, 4 Bush.)

And the deed from Valentine Stone made in 1814 being absolute, without qualification either by its terms or context, and no fraud or mistake in its execution alleged or shown, certainly would have invested her with title to the one hundred

and three-fourth acres had she not elected to abandon her title and take under the will of her husband, Charles Stone.

By his will he devised to her the whole of his real estate for life.

It appears that the 169 acres, 1 rood and 8 poles was all the land he possessed or owned at his death, and if she had renounced the will, while she would have held by survivorship the one hundred and three-fourth acres, she could not have received any of the remainder, except one-third thereof for dower.

Having taken under the will she augmented the quantity of land in which she secured a life estate, and she may have considered a life estate in the whole farm more important to her than a fee in one hundred and three-fourth acres of it and a life estate in only one-third of the remainder, and for this reason took under the will.

It is urged, however, that there is nothing in this record which shows that the testator devised her estate, or that she elected to take under the will.

This position is clearly refuted by her own deed to her son, L. M. Stone, by which she conveys her interest in the whole of the 169 acres, 1 rood and 8 poles described by parcels and meets and bounds in the conveyance.

Upon her election and assertion of title under the will each of the heirs acted in selling his or her interest to L. M. Stone. None of them claimed or sold anything but a remainder interest in fee, and she warrants only her life estate in the conveyance to L. M. Stone, which contains not one word expressive of any greater estate in her.

That she believed her husband's will devised the one hundred and three-fourth acres there is little room for doubt, as she took, held and conveyed the interest her husband devised to her consistently with the benefit it confers in consideration, it must be presumed, of the burden it imposes.

Mr. Story says, in section 1077, Eq. Juris., that "courts of equity, in such cases, adopt the rational exposition of the will that there is an implied condition that he who accepts a benefit under the instrument shall adopt the whole, conforming to all its provisions and renouncing every right inconsistent with it."

In the case of *Smart v. Easley*, 5 John J. Marshall, 215, it was said that the acceptance by a devisee of the devise was, by operation and intendment of law as well as by presumption in fact, an abandonment of all claim to the other property devised by the will.

The act of receiving the benefits or legacies of the will is an election to abide by its provisions, for by so doing the devisee may gain more than he would do by renouncing the will and asserting claim against it. See *Gore v. Stevens*, 1 Dana, in which the following quotation from Madox's Chy., volume 2, page 55, is approved:

"In a case where a widow had conflicting interests under her marriage settlement and her husband's will, and she proved the latter, acted under it and received rents for six years, she was considered as having made an election."

Matilda Stone and L. M. Stone treated the will as devising the farm on which Charles Stone lived when he devised the whole of his real estate for life to her. She sold and he purchased pursuant to the provisions of the will, and neither he nor his vendees or assignees can be allowed at this late day, after she has enjoyed the benefits of the will and died, to abandon the election so thoroughly demonstrated by the transactions between the beneficiaries under the will, and thereby alter the rights of innocent parties, advancing the interest of some at the expense and destruction of others whose claims are equally meritorious.

For these reasons the rights of the bank have not been prejudiced by the judgment disregarding the claim of title in Matilda Stone to the one hundred and three-fourths acres by survivorship.

As all the land must, therefore, be considered as having been devised by Charles Stone, his devisees, except the wife, each took an undivided and unascertained interest in remainder in every part and parcel, and of the whole tract.

So that neither could enforce a lien upon any particular portion of the farm before its division, because each held an interest that covered the whole tract and which they could not be deprived of without their consent.

Hence it follows that the position of counsel, who urge that Whaley so contracted with Stone as to require him to pay off

or bear all the incumbrances on his part of the land, is erroneous.

The only provision of the contract bearing upon this point has been substantially quoted, and it provides alone for a retention by Whaley of enough purchase money to secure him against loss in the event "title to some small portions of the land could not be made."

It turns out that title to some of the land sold to Whaley can not be made, and the court has respected and enforced the written contract between him and Stone by reducing in effect the amount of purchase money corresponding with the liens and failure of title to the 117 acres, two roods and twenty-two seventy-one hundredth poles, asserted by Stone's vendees against him. This written agreement only protects Whaley against the liens and defects in his own purchase, and he did not agree to pay or stipulate for the right to reserve purchase money for which he executed notes to discharge or protect himself from any liens or defects in Whitney's or Mrs. Wilson's purchase.

Were they substituted to Whaley's rights their land would still be subject to the incumbrances, as he has no such rights as would authorize him to pay them off or discharge them out of money due the assignees of the notes, who are innocent purchasers for value. There is no evidence in the record which shows that Whaley's purchase was to bear the burden of all the incumbrances, but upon the contrary the written contract is very plain that it was made in contemplation of such incumbrances as the law would fix upon it, and no other.

Had this controversy arisen between Stone as the holder of the notes, and Whaley, Whitney and Mrs. Wilson, then the latter could, by proper proceedings, have protected themselves and compelled Stone to have discharged all the incumbrances presented by lien or title holders. But how Whitney and Mrs. Wilson's heirs can ask in equity that purchasers as innocent as they shall bear a greater proportion of the liens upon a common tract of land from which they have all purchased a part and paid it, we are unable to see by the light of any law within the range of our investigations.

The bank and Brown, having paid Stone for the notes, stand precisely in the attitude Whaley would have occupied had he paid Stone in full before discovering any incumbrances upon the land, and in the attitude that Whitney and Mrs. Wilson's heirs now stand.

The authorities in Kentucky, the modern English cases and text writers, agree that the original incumbrance or lien ought to be borne ratably between the subsequent purchasers or incumbrancers according to the relative value of the estates.

Upon principle this seems to be just. Purchasers or incumbrancers who are prior in point of time have a superiority of right as between themselves, so far as payment out of the property is concerned, upon foreclosure, when no original incumbrance appears, but when it is ascertained that property mortgaged or sold in different parcels to purchasers was subject to a lien or incumbrance, it can not be reasonably said that the one, prior in point of time, has any more right to be exempted from the incumbrance than the last purchaser, because both purchased when the incumbrance existed and had equal opportunity to know that neither could take the property free from the incumbrance. If only one purchase the whole property it would be subject to the original burden, so if two or more purchase the whole property in different parcels it would still be subject to the original incumbrance, simply because the separate purchase of distinct parcels is made with constructive knowledge that the whole property is bound, and not with the understanding that the first purchaser will be protected from the prior incumbrance by a failure upon the part of a second to do that which he neglected to do himself.

In *Dickey v. Thompson*, 8 B. M., 312, where the authorities upon this subject are reviewed, it was declared to be no longer an open question in this court that the purchasers of different parcels of mortgaged estate should contribute to the removal of the burthen ratably, after first exhausting the residuum, if any, remaining in the hands of the mortgagor himself, unless bad faith were practiced.

The court below did right in refusing to estimate the value of the several parcels purchased by Whitney, Mrs. Wilson and Whaley at the price agreed to be paid, the rule being that the

value at the time of foreclosure of the liens is the proper criterion apportionment.

For an exposition and application of these principles see Story's Eq., section 1233, note 2, and authorities cited.

Brown, at the instance of Stone, and with the knowledge and concurrence of Whaley, bought and paid for the note held by him, and unless it were shown that Brown intended to release the lien, or waived his right to assert it by consenting to its omission from the conveyance made by Stone to Whaley, he can not be deprived of his right to the lien by their mistaken or fraudulent conduct or oversight in its execution. (4 Bush, 168; 6 Bush, 662; Story's Eq., section 1224.)

The mere taking of additional security would not of itself, aside from the intention of the party, amount to waiver of his lien, as the intention governs in such cases (4 B. M., 132; 6 B. M., 723). And in this case no additional security was taken by Brown; he continued to look to Whaley, the original and only payor, and to the land for payment. The identity of the purchase money has never been lost, but it is capable of an exact ascertainment. The agreement, therefore, of Whaley with Brown to pay 10 per cent. interest, a larger rate than the note had borne, without any intention upon the part of either of removing the lien, was no waiver of it (*Muir v. Cross, &c.*, 10 B. M., 284). This is not a case where additional security has been taken, but one where the obligor and his general creditors seek to destroy the only security the holder of the note possesses.

The facts upon which the position is taken are insufficient to sustain it. Brown neither participated in the making of the deed, nor consented to the omission from it of a lien for his share of the purchase money, nor was the increased interest intended to alter the evidence of the debt or waive the lien. And the effort to deprive him of his lien does not present itself in a court of equity with much grace in face of the facts that Brown was not consulted about how the deed was to be made; that the amount of his note was carefully excluded from the sum of the purchase money, which was named in the deed as unpaid, and no additional security was ever attempted or intended to be given him by Stone or Whaley. And we conclude

that their voluntary action should not be allowed to prejudice his lien, which would otherwise be unquestionable.

As to the doctrine that the claim of the assignee in bankruptcy, who was appointed for Whaley during the pendency of this litigation in behalf of the general creditors, has priority over Brown or the bank, the authorities are decidedly against its soundness.

It is laid down by Mr. Story, in section 1228 of his work on Eq. Jur., speaking of the extent bona fide purchasers for valuable consideration are affected by the vendor's lien, that "the lien will also prevail against assignees claiming by a general assignment under the bankrupt and insolvent laws, and against assignees claiming under a general assignment made by a failing debtor for the benefit of creditors, for in such cases the assignees are deemed to possess the same equities only as the debtor himself would possess."

What equities has Whaley shown against Brown's untainted and unsatisfied lien? None whatever. And in a contest between them alone Brown, in equity and good conscience, would and ought to prevail.

In the case of *Bayley v. Greenleaf*, 7 Wheaton, Chief Justice Marshall laid down the rule thus:

"The lien of the vendor, if in the nature of a trust, is a secret trust, and is to be preferred to any subsequent, equal equity unconnected with a legal advantage or equitable advantage, which gives a superior claim to the legal estate." And it was held by the English court, in *Mitford v. Mitford*, 9 Vesey, which is supported by many like cases, that an assignment in bankruptcy passes the rights of the bankrupt precisely in the same plight and condition as he possessed them, subject to all equities enforceable against him. In speaking of "title subject to equities," Bump on Bankruptcy, 10th edition, page 500, in his analysis of the authorities in this country under the last bankrupt law, says that "the assignee takes the property of the bankrupt subject to all legal and equitable claims of others," and that "he is affected by all the equities that can be urged against the bankrupt."

Chief Justice Church held, in *Kelly v. Scott*, that the debtor being estopped from denying the rights of an attaching cred-

itor, the assignees of the debtor were also estopped, because "they have no other or superior rights to him, and they are vested with the property subject to all equities against it in his hands." (49 N. Y.)

In *Lazeas v. Porter*, Assignee, 7th Reporter, 216, the Supreme Court of Pennsylvania said that "the estate taken by the assignee is precisely that of the bankrupt."

Assignees in bankruptcy are not innocent purchasers for a valuable consideration in the same sense that ordinary purchasers for value without notice are, for the former do not part with their money or property as a consideration for, and, therefore, become the absolute owner of the thing or property assigned, but the latter do, and they have the superior merit of contracting for and paying the value of the property, the title to which the law vested absolutely in them on that account.

The merits and rights of such purchasers are not equal, and the distinction between their rights is founded in justice and sustained by authority. (5 Ark., 492; 5 Ill., 427; 20 Vt.: 2 Story, 334, 630; 9 B. R., 433; 106 Mass., 334; 18 Wallace, 332, and many other cases not necessary to cite.)

We are of opinion that the assignee, Jones, while he represents the creditors, can acquire for them no greater rights than they themselves could have enforced before the assignment, and that he holds the estate of the bankrupt, Whaley, just as the latter held it subject to the lien of Brown, who may be said not only to possess an equitable but a legal lien for his debt.

There is nothing in the contract or deed, had the latter been drawn according to the rights of the parties between Stone and Whaley, that authorizes the inference that one part of the purchase money was to be regarded as secured by an inferior or secondary lien to that of any other, and certainly the conduct of the parties have not changed the relative positions of the liens for the purchase money. The judgment is in accord with these views, and it is, therefore, affirmed upon the appeals of *Whitney, &c. v. Stone, &c.*, and of *The Exchange and Deposit Bank of Owingsville v. Stone, &c.*

Reid & Stone for Whitney; R. & W. S. Gudgell for Exchange and Deposit Bank, &c., appellants.

Nesbitt & Gudgell and W. H. Holt for appellees.

ADAM'S EX'OR v. OREAR, &c.

(Filed February 23, 1882.)

1. By answering a cross petition to which they were not made parties, necessary parties thereby entered their appearance and became parties to such cross petition.

2. Action was upon the new promise, in this case, wherein the plaintiff set out the sale and receipt of the goods, itemized in the account filed, and the promise made by the defendant within two years before suit that he would pay the account, and his failure to pay.

3. Conveyance of land to the wife of an insolvent husband by a third person, the land being paid for by such insolvent husband. Such conveyance is not within the statute against fraudulent conveyances, because the title was not vested in or conveyed by the insolvent husband.

But such conveyance to the wife of an insolvent husband is actually fraudulent as to pre-existing debts or demands, or demands against the husband, and the land so conveyed may be, and is, subjected to such demands, in this case.

"The fact that this conveyance does not come within the statute gives it no sanctity against the principles of the common law which have not been repealed, but enlarged by the statute as to the class of classes embraced by it."

4. "When a deed shall be made to one person and the consideration shall be paid by another, * * * such deeds shall be deemed fraudulent as against the existing debts and liabilities of the person paying the consideration." (Sections 19, 20, article 1, chapter 63, General Statutes.)

Said section 20 so modifies said section 19, as to prevent its misapplication to these trusts which result to the debtor for the benefit of creditors.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Hargis.

Evans bought and paid for 18 acres and 1 rood of land, which he caused his vendors to convey to his wife.

At the time he did this he was indebted to the appellant's testator by two notes and an account for \$194.21.

The appellant began her suit by cross petition, in an action wherein Mrs. Evans' heirs at law were seeking to remove a mortgage from the land which they claimed by descent, alleging that Evans was insolvent and fraudulently caused the conveyance to be made to his wife for the purpose of cheating and delaying his creditors, without any valid or valuable consideration, and prayed for the subjection of the land to the payment of said debts.

Evans' heirs, who were persons distinct from the heirs of his wife, were made defendants to the cross petition, but the heirs of the wife were not made defendants, yet having answered the

cross petition they thereby entered their appearance and became parties to it, and, therefore, there was no defect or want of necessary parties to appellant's action.

The appellees controverted the allegations of fraud, denied the account and pleaded the statute of limitation to it, and traversed the alleged new promise to pay the account made by Evans within two years next before the filing of the cross petition.

The reply denied that the new promise was barred by limitation, and the amended cross petition reiterated its existence.

It is insisted by counsel that the suit is upon the original account, and not upon the new promise.

If this be true the action is barred, but we think the action is upon the new promise, and that it is sufficiently stated.

The sale and receipt of the goods itemized in the account; the promise made by Evans to the appellant and her testator also, within two years before suit, that he would pay the account, and his failure to pay for the goods are expressly alleged by appellant, and what else is necessary to constitute a cause of action on the new promise we are unable to perceive.

The consideration, promise and breach are averred by appellant and denied by appellees, and it seems to us this constitutes an action and issue on the new promise.

Waiving any consideration of the competency of appellant as a witness against the appellees, who are heirs of a deceased person, we are of opinion that the other testimony in the record proves the justice of the account, and that Evans promised to pay it as alleged, and judgment should have been rendered in favor of appellant for it also.

Evans was insolvent when he paid for the land, and caused the deed to be made to his wife without any valuable consideration, and counsel for appellees contend that the conveyance can not be avoided for two reasons: First, Evans' vendors honestly conveyed their title to the land, and innocently received the money for it; second, Evans, the debtor, did not convey the land to his wife.

Of course he could not convey the title, because it never had been vested in him.

These are in substance the reasons given in the cases of *Crozier, &c. v. Young, &c.*, 3 Mon., 157, and *Marshall, &c. v. Marshall, &c.*, 2 Bush, 421, for the construction which confines the statute against fraudulent conveyances to conveyances or alienation made by debtors in fraud of their creditors.

This construction of the statute was stated in the case of *Doyle, &c. v. Sleeper, &c.*, 1 Dana, 538, so clearly that there can be no misunderstanding it. The learned judge said: "But the judges of England, with all their zeal for extending, by a construction peculiarly latitudinarian, the operation of the statute of 18th Elizabeth, never applied it to a case like this, in which the conveyance was made, not by the debtor or of his estate, but by another person, at his instance and in consideration of his money. The statute was never applied to purchases by a debtor, but has been construed to operate only on conveyances by him." (Citing *Crozier v. Young* and the two English cases of *Procter v. Warren*, Sel. Cas., Lord King's time, and *Lampeigh v. Lampeigh*, 1 Peere, Williams' Reports.)

While we assent to this construction of the statute, supported as it is by well-understood precedents, we are not ready to agree with the position that such a conveyance as this can cover from the reach of pre-existing creditors the property and money of their debtor.

Beginning with the case of *Crozier v. Young*, 3 Mon., the common law doctrine that "fraud vitiates everything" has never been denied by this court. And that case was decided not to be within the common law rule upon the sole ground that the creditor failed to show that he had a pre-existing debt or demand, the court saying:

"Fraud is indeed odious to the common law, and is discountenanced by it in every shape in which it may make its appearance. But the common law does not, like the statute against fraudulent conveyances, protect the interest of subsequent as well as precedent creditors. A creditor to be entitled to the protection of the common law, against the effect of a fraudulent transaction, must show that he had a pre-existing debt or demand; for otherwise his rights were not supposed by the common law to be injured by the fraud. But the creditors

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in this case have failed to show that they were the creditors of Crozier when the fraudulent transactions of which they complain took place."

While legal or constructive fraud does not exist at common law, and it takes cognizance of actual fraud alone requiring proof of fraudulent intent, the consideration of love and affection between husband and wife will not be sufficient to support a conveyance as against pre-existing creditors, where the husband was insolvent or indebted at its execution to a material extent, for the common law will not permit the obligations of the marriage relation to be used as an instrument of fraud.

Lord Northington said, in *Patridge v. Gopp, Ambler*, 598: "I think no man has such a power over his own property to dispose of it so as to defeat his creditors unless for consideration. It is the motive of the giver, not the knowledge of the acceptor, that is to weigh." And being asked as to the extent of this doctrine, he said:

"The fraudulent intent is to be collected from the extent and magnitude of the gift."

And in the discussion of this doctrine this court said, in *Doyle v. Sleeper*, 1 Dana, that there was no divisions of opinion between those who had differed about its soundness on this point, "that land fraudulently conveyed to a child instead of the father, and bought with the father's money, might be subjected to his debts," and decided that Doyle, who was insolvent, having purchased and paid for real estate with his money and caused the title to be conveyed to his children, committed a fraud upon his creditors, and subjected the land to the payment of his debts.

The fact of mere indebtedness will not prevent a father from making proper advancements to his children or such a settlement upon his wife as "a clear sense of moral duty requires him to make," nor will they be disturbed after they are made. But what is a justifiable settlement or proper advancement depends upon the intent of the father and his condition, both as to property and indebtedness, at the time he makes them.

It is said in *Stokes & Son v. Coffey, &c.*, 8 Bush, 587, that "such advancements or settlements, to be upheld against antecedent creditors, must be characterized by the utmost good faith."

And a disregard for the interest of creditors, such as is shown by the act of Evans, who, being insolvent, paid for the land himself and caused the title to be made to his wife, will render the transaction fraudulent.

For had Evans been solvent and without creditors, it is highly probable that the conveyance would have been made to himself instead of his wife, as no necessity for avoiding their claims would then have pressed him.

The facts in this case bring it within the principles of the common law, which renders fraudulent as to prior debts the voluntary conveyances of debtors who are insolvent or in such doubtful circumstances as renders it hazardous to the rights of the creditors. The fact that this conveyance does not come within the statute gives it no sanctity against the principles of the common law, which have not been repealed but enlarged by the statute as to the class of cases embraced by it.

And it seems to us it would be against the substance of justice to allow an insolvent debtor to securely cover his money and property from his creditors by investing it in property, the title to which he causes to be invested in another who pays or renders him no valuable consideration therefor. It seems that such a case is embraced by section 20, article 1, chapter 63, General Statutes, which provides: "When a deed shall be made to one person and the consideration shall be paid by another, that such deeds shall be deemed fraudulent as against the existing debts and liabilities of the person paying the consideration." "

This section so modifies section 19 of the same article, which abolishes resulting trusts, as to prevent its misapplication to those trusts which result to the debtor for the benefit of creditors.

Wherefore, the judgment is reversed and cause remanded, with directions to render judgment in conformity to this opinion.

Reid & Stone for appellants.

B. J. Peters and W. H. Winn for appellees.

BOWLING v. COMMONWEALTH.

(Filed December 17, 1881.)

1. "A conviction can not be had upon the evidence of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely show that the offense was committed and the circumstances thereof." (Criminal Code, section 24.)

2. Uncorroborated testimony of an accomplice is wholly insufficient to convict the accused of a crime, or of its constituent element, or to render admissible any confessions or admissions of other persons which depend upon and must be preceded by evidence of a conspiracy.

3. Before admitting evidence of alleged statements of an alleged accomplice of the accused, not made in the presence of and acquiesced in by the accused, there should have been other evidence tending to prove a conspiracy and connect the accused with it than that of the accomplice.

Appeal from Clay Circuit Court.

Opinion of the court by Judge Hargis.

In the year 1873 the house of Solomon Garland was broken into and robbed.

The robbers went to the house late in the night, after all the inmates had retired, and with a rail broke open the door, entered and carried away a wooden box that contained three small boxes in which Garland had deposited \$204.25.

Three tracks were found next morning which led from the house to a spot in a field near by where the boxes were broken open, rifled and left.

In a few days several persons were arrested and tried for the robbery, but no sufficient evidence being produced they were discharged.

For five years nothing further seems to have been done to discover the perpetrators of the offense, when, for the first time, one Jackson Archer, having become very bitter in his feelings against Russell and Joseph Bowling, accused them of the robbery.

They were both indicted and tried at the same term of the court, Joseph was convicted and Russell Bowling was acquitted, yet the record shows such a state of facts as proves that neither or both were guilty.

Upon the trial of the appellant, Joseph Bowling, the only evidence tending to connect him with the conspiracy and

alleged robbery charged in the indictment was that of Archer, who admitted facts sufficient to show that he was an accomplice in the commission of the offense.

It is true he swears he was innocent, but the facts contradict him, and his evidence is inconsistent and fails to sustain his protestations.

His testimony confirms the wisdom of the legislature in providing that "a conviction can not be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely show that the offense was committed and the circumstances thereof." (Section 241, Criminal Code.)

Several witnesses were permitted to testify, against appellant's objections, to the statements of Russell Bowling, which were not made, if made at all, in the presence of the accused.

These alleged statements tended to prove a conspiracy to commit the robbery and to involve the appellant as a participant in the conspiracy.

It is clear, under the section of the Code quoted, that the uncorroborated testimony of an accomplice is wholly insufficient to convict the accused of a crime or of any of its constituent elements, or to render admissible any confessions or admissions of the parties, which depend upon and must be preceded by evidence of a conspiracy unless other evidence, besides that of the accomplice, is produced tending to prove a conspiracy and connect the accused therewith, and evidence merely showing that the offense was committed and the circumstances thereof is as insufficient for that purpose as it would be to connect the accused with the commission of the offense itself.

Before admitting the evidence of the alleged statements of Russell Bowling, not made in the presence and acquiesced in by the appellant, there should have been other evidence, tending to prove a conspiracy and connect the appellant with it than that of Archer, the accomplice.

Wherefore, the judgment is reversed and cause remanded, with directions to grant appellant a new trial.

John & J. W. Rodman for appellant.

P. W. Hardin for appellee.

ABSTRACTS OF KENTUCKY DECISIONS.

BROWN v. BOARD, &c.

Filed February 2, 1882—Not to be reported.

Appeal from Marlon Circuit Court.

Opinion of the court by Chief Justice Lewis, reversing.

Waiver of right to plead statute of frauds, and verbal contract to sell land enforced.

“Appellees, the heirs at law of Felix Meroer, deceased, having in their reply waived the right to plead and rely upon the statute of frauds as a defense, and consented that a conveyance of the house and lot in controversy shall be made to appellant upon satisfactory proof by him that he purchased and paid for the property, the only question really in the case is whether he has made such proof.”

Proof of purchase and payment by two uncontradicted and substantially consistent witnesses is held to be sufficient in this case.

J. R. Thomas for appellant.

Russell & Avritt for appellees.

COOK v. FRYER, &c.

Filed February 2, 1882—Not to be reported.

Appeal from Jefferson Common Pleas Court.

Opinion of the court by Chief Justice Lewis, affirming.

Real estate agent is entitled to his agreed commissions when he procures a purchaser, who is ready and willing to make and complete the purchase upon the agreed price and terms.

If the principal fails or refuses to comply with his offer or contract to sell, because his wife refuses to relinquish her dower, as in this case, the agent is entitled to the agreed compensation for his services.

C. B. Seymour for appellant.

Young & Trabue for appellees.

KNOX, &c. v. SHANNON.

Filed February 2, 1882—Not to be reported.

Appeal from Hancock Circuit Court.

Opinion of the court by Judge Pryor, affirming.

1. An illegal levy upon some hay, at the instance of the defendant, by which the owner was dispossessed, and the hay ruined by rain, rendered the appellant liable therefor.

2. The amount of damages sustained is the value of the hay and the proper attorney's fees, etc.

W. N. Sweeney & Son for appellants.

Ell Brown for appellee.

OWENS, &c. v. FORD, &c.

Filed February 2, 1882—Not to be reported.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Hargis, reversing.

Agreement between husband and wife, by which she allowed him to sell land which descended to her in the State of Tennessee and use the proceeds on condition that he would purchase for her another tract, was not fraudulent as to creditors in this case, the land having been purchased by the husband for the wife before the creation of the debt sued on.

D. G. Park for appellants.

POSEY v. MAYER'S ADM'R.

Filed February 2, 1882—Not to be reported.

Appeal from Henderson Common Pleas Court.

Opinion of the court by Judge Hargis, reversing.

1. A new promise by a bankrupt to pay a debt from which he had been discharged is founded upon a moral consideration and constitutes a valid and enforceable contract.

2. Promise to pay eight per cent. interest on a note, which does not specify from or to what time the interest is intended to run, is in law an undertaking to pay eight per cent. interest from the date of the promise; but the promise to pay that rate, which is conventional and greater than the legal rate, does not embrace any time beyond maturity.

3. Six per cent. interest after maturity will be allowed when the note does not fix the rate by its terms.

Geo. A. Prentice for appellant.

J. F. Clay and W. P. D. Bush for appellee.

GONHOT, &c. v. HIPKINS.

Filed February 2, 1882—Not to be reported.

Appeal from Christian Circuit Court.

Opinion of the court by Judge Hargis, affirming.

Remission of a fine granted by the city council of Hopkinsville, under the charter of that city, relieves the whole of the judgment, including the fees of the city attorney, except the costs and fees due the city. Held—That

"While the city court, by the amendment of March 6, 1871, was limited in its jurisdiction to cases where the penalty does not exceed \$100, and the fine imposed by it upon appellee Hipkins, by a simple judgment, was \$1,200, still that judgment might have been corrected on appeal, and we, therefore, think the power, in the nature of a writ of prohibition, could not be exercised over the court's action in exceeding the lawful bounds to the extent of fines and penalties it may inflict."

J. P. Ritter and J. & J. W. Rodman for appellants.

John Feland for appellee.

BROWN, &c. v. CASBIER, &c.

Filed February 2, 1882—Not to be reported.

Appeal from Ohio Circuit Court.

Opinion of the court by Judge Hargis, affirming.

1. Goods and profits of business carried on by wife can not be converted into separate estate by the mere assent of the husband, or even by an express agreement. This can be done only by a court of chancery, and the husband's consent thereto, when necessary, must be given of record in that court.

2. The proceeds of a wife's general estate may be set apart to her separate use, but there is no allegation in this case that the money for which the wife sold her land or the groceries bought with the money or the profits of the business were to be held by her as her separate estate, therefore, the groceries were the property of the husband and subject to his debts.

3. Party should be named in the caption and also in the body of the petition.

The name of the husband appears as co-plaintiff in the caption of the petition, "but he is not mentioned in the body of the petition, and the plural term, 'plaintiffs,' used in the petition expressly refers to Mrs. Brown and the Commonwealth, which she joined as plaintiff, for her use and benefit," and, therefore, the demurrer to the petition was properly sustained so far as the husband was concerned.

4. Wife can not sue for an injury to her husband's property merely because she has it in her manual possession.

Sandifer & Fogle for appellants.

Walker & Hubbard for appellees.

NEAL, &c. v. CITY OF LOUISVILLE.

GARRISON v. SAME.

Filed February 4, 1882—Not to be reported.

Appeals from Jefferson Circuit Court.

Opinion of the court by Chief Justice Lewis, affirming.

1. Action to sell real estate for taxes due the city of Louisville may be maintained by said city.

The city recovered judgment to sell the lots and at the sale became the purchaser, sale was confirmed, deed made to the city, writ of possession issued, and the city put in possession November 1, 1879.

2. Mistake in the commissioner's deed in describing the lots sold under the decree to pay taxes is corrected and the title of the purchaser quieted, and the counterclaims and petitions of the defendants asserting title and right to possession as against the purchaser are all dismissed.

3. The judgment directing the sale of the lots to pay the taxes due the city and the sale made under that judgment barred the claim of the defendants in that action, both in their counterclaim, in the action of the purchaser to correct the commissioner's deed and quiet the title, and in their separate actions to recover the title and possession from such purchaser.

Buford Twyman for appellants.

H. M. Lane for appellee.

STEPHENS, &c. v. NORTON, &c.

Filed February 4, 1882—Not to be reported.

Appeal from Jefferson Circuit Court.

Opinion of the court by Chief Justice Lewis, reversing.

1. In forcible entry and detainer the verdict must authorize the judgment.

"The issue for the jury to try in this case was whether the inquisition traversed is true or not, and without a verdict of the jury finding it to be true the court was not authorized to render judgment for restitution of the premises."

2. The special finding by the jury that the landlord did not agree with one of the tenants to release him as such from liability for the rent did not authorize the inference that either of them forcibly detained the premises from the landlord, for that might be true and the inquisition not true.

R. H. Thompson for appellants.

I. & J. Caldwell & Winston for appellees.

KASTENBINE v. CITY OF LOUISVILLE.

Filed February 4, 1883—Not to be reported.

Appeal from Jefferson Circuit Court.

Opinion of the court by Judge Hargis, affirming.

1. Fees of physicians employed by coroner in city of Louisville—"Section 12 of chapter 25, General Statutes, by which the coroner is authorized to employ a competent surgeon or physician to make a post mortem examination, and the court of claims is required to allow the surgeon or physician a reasonable sum therefor, is not in conflict with the provision of the act of January 21, 1865 (Elliott's Digest, 216), so far as it relates to the city."

2. Local acts were not repealed by the act adopting the General Statutes, and the act of January 21, 1865, above referred to, being local in its nature, was not repealed thereby.

W. B. Fleming for appellant.

T. L. Burnett for appellee.



KAHN & WOLF v. GOODHART, &c.

Filed February 4, 1882—Not to be reported.

Appeal from McCracken Common Pleas Court.

Opinion of the court by Judge Hargis, reversing.

Private sale of personal property, without change of possession from seller to buyer, is held to be fraudulent and void as to creditors in this case.

The residence of the vendee with the vendor, at the time of the sale, did not take this case out of the operation of this rule.

W. P. D. Bush and I. & J. Caldwell for appellants.

TAYLOR'S GUARDIAN v. JOHNSON.

Filed February 4, 1882—Not to be reported.

Appeal from Todd Circuit Court.

Judge Hargis delivered the opinion of the court, affirming on original and reversing on cross appeal.

1. Purchaser of land by verbal contract, being put into possession, is not liable for rent for any period prior to the institution of this suit to recover the possession thereof.

2. Purchaser in possession under verbal contract for several years having paid the purchase price and made valuable and lasting improvements upon

the land, is entitled and adjudged to have a lien upon the land for the purchase price paid by him and the value of his improvements.

Ben T. Perkins, Jr., for appellant.

H. G. Petrie for appellee.

HUDSON, &c. v. L. & N. R. R. CO.

Filed February 4, 1883—Not to be reported.

Appeal from Boyle Circuit Court.

Opinion of the court by Judge Pryor, affirming.

After three trials the verdict ought not to be disturbed on the complaint that the plaintiff did not receive the amount of damages to which he was entitled, the law having been correctly submitted to the jury.

Thompson & Thompson for appellants.

Durham & Jacobs and Wm. Lindsay for appellee.

HOUSTON, JOHNSON & CO., &c. v. ROSS, &c.

Filed February 4, 1882—Not to be reported.

Appeal from McCracken Common Pleas Court.

Opinion of the court by Judge Pryor, reversing.

Creditor had the right to subject whatever interest the decedent had in the land to the payment of his debts in this case.

Wm. Lindsay and J. C. Gilbert for appellants.

J. W. Bloomfield for appellees.

BALLARD v. FRANKLIN, &c.

Filed February 4, 1882—Not to be reported.

Appeal from Madison Common Pleas Court.

Opinion of the court by Chief Justice Lewis, affirming.

Petition to subject married woman's land to her husband's debts was properly dismissed because she was not made a party or served with process.

John Bennett and Rankin Muson for appellant.

C. F. & A. R. Burnam for appellees.

FOWLER v. GORDON.

Filed February 4, 1882—Not to be reported.

Appeal from Jefferson Common Pleas Court.

Opinion of the court by Judge Pryor, affirming.

1. Alteration of writing.

Whether the original contract of lease was altered or not was a question for the jury to determine in this case.

2. Verdict being for greater damages than asked in the petition, the court did not err in entering judgment for the amount asked in the petition.

3. Witness must be attacked before judgment.

New trial to allow the defendant to show that the witnesses for the plaintiff, prior to the trial, had made statements contradictory to those made before the jury, was properly refused in this case. "There is no reason why the witnesses for the plaintiff or their statements were not attacked prior to the rendition of the judgment."

4. Judgment in action for the recovery of specific property, for the value of the property sought to be recovered, and not for the property itself, was not erroneous in this case, because the plaintiff could have elected to take a writ of *fi. fa.* for the value of the property.

E. E. McKay and Badger & English for appellant.

M. Munday and R. B. Hawkins for appellees.

MAUPIN, &c. v. BERKLEY.

Filed February 7, 1882—Not to be reported.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Pryor, reversing.

1. Notice of intention to revive action against personal representative, given in this case within six months after the qualification of the personal representative, can not be objected to for the first time in the Court of Appeals.

2. The testimony of a party for himself concerning a transaction with a person dead, when the testimony is offered to be given, should be admitted when some one interested (in this case an heir) has testified against such party with reference thereto.

3. Allegation of surety that his signature was placed to a note without "his written authority," relieves such surety from liability when the only defense made is the allegation that the person who signed the note for the surety had authority to do so, without also alleging that he had written authority, which the statute expressly provides shall be given before the signature in such cases shall be deemed binding.

4. Meaning of the word "signature," section 732, subsection 5, Civil Code, reading: "The words 'signature,' 'subscription' and words of like import, include a mark by, or for, a person who can not write, if his name be subscribed to an instrument and witnessed by a person who, near thereto, writes his own name as witness," applies only to such instruments as are required to be executed under the provisions of the Code, but—

5. A mark by or for a surety, who can not write, is a signature in law, although not witnessed as required by the Civil Code.

6. The Code merely regulates practice in civil cases, and can not determine the validity of contracts, and the execution of ordinary obligations creating personal liabilities.

J. N. Nesbit and W. H. Holt for appellants.

Reid & Stone for appellee.

CONVERSE & CO. v. LOUISVILLE ABSTRACT AND LOAN ASSOCIATION.

Filed February 7, 1882—Not to be reported.

Appeal from Jefferson Common Pleas Court.

Opinion of the court by Judge Pryor, affirming.

Law and facts were submitted to lower court and action properly dismissed by it.

Young & Boyle and E. F. Trabue for appellants.

A. E. Richards for appellee.

CRITTENDEN COUNTY v. CONGER.

Filed February 7, 1882—Not to be reported.

Appeal from Crittenden Common Pleas Court.

Opinion of the court by Judge Hargis, reversing.

1. Action against county court for damages for breach of alleged contract to keep paupers.

The contract, its breach and the facts showing the loss of damage occasioned thereby should be alleged.

2. County court could invest its agent with power to contract only through orders made of record in that court.

In this action against the county court it was necessary for the plaintiff to allege and show that the agent of the county made the contract; that the agent acted within the scope of his authority in doing so, and also by the records of the county court that the contract was authorized by the county court.

L. H. James and Wm. Lindsay for appellant.

LAYNE, &c. v. LOAR.

Filed February 7, 1882—Not to be reported.

Appeal from Floyd Circuit Court.

Opinion of the court by Judge Hargis, affirming.

1. A judgment which can be set aside or modified by the court which rendered it, upon motion made after the term, will not be reversed by the Court of Appeals until a motion to set aside or modify the judgment shall have been made in the inferior court and overruled. (Civil Code, section 763.)

2. Resale of land sold at a judicial sale, for which the purchase money was not paid, was properly ordered by the chancellor in this case, the purchaser having been notified of the intended proceedings, and failing to object.

3. Resale on a credit of six months was properly ordered by the chancellor in this case.

4. The law requiring appraisements under decretal sales does not apply to debts created before its passage.

5. The failure of the court to specify more particularly the amount for which the land was resold, not being prejudicial to appellants, is not cause of reversal.

W. H. Holt and Weddington & Stuart for appellants.

Wm. Lindsay for appellee.

CALLAHAN v. MURPHY.

Filed February 9, 1882—Not to be reported.

Appeal from Jefferson Common Pleas Court.

Opinion of the court by Judge Pryor, affirming.

On the issues and evidence as to the contract and changes in the contract, extra work, work actually done and the measurement thereof, etc., as to the verdict of the jury the court say: "This is the very character of verdict this court ought not to disturb."

Lane & Harrison for appellant.

Redman & Brown and C. B. Seymour for appellee.

MARSHALL, &c. v. VAN METER, &c.

Filed February 9, 1882—Not to be reported.

Appeal from Grayson Circuit Court.

Opinion of the court by Judge Hargis, reversing.

1. Lien created by levy was superior to the stale equity of the wife in this case, in which a deed to land, bought with the wife's money, is alleged to have been made to the husband by mistake.

"The exhibits filed with the petition show that the deed had been made for about twenty years, and that appellants had sold and deeded fractions from the original tract as if no mistake had been made in the deed to the husband, and the levy of the execution against the husband was made while the legal title, coupled with the possession, was in the husband, and the appellees' rights, which became certain by the levy, are superior to the stale equity of the wife, unsupported by the allegation of any specific facts showing that the money paid for the land was hers."

2. Debtor has a right to be heard as to the value of the homestead to which he is entitled by the exemption laws.

Wilson & Hobson and W. R. Hanes for appellants.

Conklin & McBeath and G. W. Stone for appellees.

DIAMOND v. CLEM.

Filed February 14, 1882—Not to be reported.

Appeal from Clark Common Pleas Court.

Opinion of the court by Chief Justice Lewis, affirming.

Unless the verdict is flagrantly contrary to the evidence the Court of Appeals will not reverse the decision of the lower court as being contrary to the weight of the evidence.

W. D. Jackson for appellant.

W. W. Cocke for appellee.

BURNS v. PLEASANT HILL & JESSAMINE TURNPIKE ROAD CO., &c.

Filed February 14, 1882—Not to be reported.

Appeal from Jessamine Circuit Court.

Opinion of the court by Chief Justice Lewis, reversing.

1. Neither stock in turnpike company which belongs to private individuals, nor the corporate powers which are vested in them, can be sold under judgment of a court.

2. President and directors of the company having purchased the road at the decretal sale, "they must be considered as holding the property purchased to the extent the purchase was valid at all in trust for the use of the company, composed of the stockholders. In other words, their purchase did not extinguish the corporate existence of the company or transfer to them (the purchasers) any of the rights or interests of the stockholders."

3. "An act to charter the Pleasant Hill & Jessamine County Turnpike Road Co.," approved March 9, 1867, "is unconstitutional, because it exempts the corporation and the property of that corporation that were before liable to creditors from all responsibility for any debt or debts contracted by the original company."

The creditors of the company prior to the sale were not prejudiced by the sale, but should be paid pro rata out of the tolls and profits with the creditors whose debts originated after the sale.

J. & J. W. Rodman and Wm. Lindsay for appellant.

J. S. Bronough for appellees.

MORROW v. MORROW, &c.

Filed February 14, 1882—Not to be reported.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Pryor, reversing.

Waste was not committed by the life tenant in this case by cutting timber, etc.

The land having become unproductive by long cultivation, and the houses, etc., upon it dilapidated, it was not waste for the life tenant to cut and sell timber growing upon a portion of the land and make improvements with the proceeds, enough timber having been left for the necessary purposes of the farm.

R. Rodes for appellant.

Halsell & Mitchell for appellees.

PETERS, &c. v. SWORD'S EX'OR.

Filed February 16, 1882—Not to be reported.

Appeal from Pike Circuit Court.

Opinion of the court by Judge Hargis, reversing.

Services rendered to the testator by the devisee canceled a lien directed in the will to be retained upon the land devised in this case.

The evidence shows that the lien for \$250 retained by the will upon the land devised was retained to offset the claim of the devisee for services.

A. J. Auxier for appellants.

Connolly & Parsons for appellee.

GRAHAM, &c. v. JONES.

Filed February 16, 1882—Not to be reported.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor, reversing.

The report of the commissioner is held to be defective in this case, and the case is directed to be referred back to the commissioner as if there had been no former report.

M. Mundy for appellants.

Jas. A. Beattie and John R. M. Polk for appellee.

SMITH v. PARRISH, &c.

Filed February 16, 1882—Not to be reported.

Appeal from Scott Circuit Court.

Opinion of the court by Judge Pryor, affirming.

Purchaser of land devised to be sold on trust or for a specific purpose is not bound to look to the application of the purchase money unless so expressly required by the conveyance or devise.

Geo. V. Payne for appellant.

Jas. F. Askew for appellees.

ISENBURG v. STRASSER.

Filed February 16, 1882—Not to be reported.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Lewis, affirming.

1. In satisfaction of the vendor's claim for \$2,000, that being one-third of the consideration agreed to be paid for a tract of land, the court set apart and allotted to the vendor one-third of said tract of land.

2. The judgment setting apart one-third of the land in satisfaction of the vendor's claim barred his right to recover the \$2,000.

M. Mundy for appellant.

M. A. Sachs and John C. Walker for appellee.

LAYNE, &c. v. DAVIDSON.

Filed February 18, 1882—Not to be reported.

Appeal from Floyd Circuit Court.

Opinion of the court by Judge Hargis, affirming.

1. Right to redeem land incorrectly appraised may be waived by failing, within a year, to offer to redeem or to make any excuse for such failure.

2. Irregularities in advertising and making the sale to which the plaintiff was not privy, did not invalidate the sale in this case.

Weddington & Stuart for appellants.

Wm. Lindsay for appellee.

GRIGSBY, &c. v. GRIGSBY'S ASS'EE, &c.

Filed February 18, 1882—Not to be reported.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Pryor, affirming.

The commissioner's report in this case is correct and conclusive, and should not be disturbed.

A. Duvall for appellants.

Muir & Wickliffe for appellees.

CONTINENTAL INS. CO. OF N. Y. v. WARE.

Filed February 18, 1882—Not to be reported.

Appeal from Bracken Circuit Court.

Opinion of the court by Judge Pryor, affirming.

Overvaluation by the assured of the property insured, when made in good faith, can not amount to a warranty or affect the rights of the parties in any way.

If the value as stated by the assured is untrue the insurance company must show that he falsely, and with the purpose of defrauding the company or its agent, placed an overvaluation on the property insured before the policy can be held to be void for substantial misrepresentation.

Wadsworth & Sons for appellant.

A. Duvall and B. G. Willis for appellee.

TROWER v. GABHART, &c.

Filed February 21, 1882—Not to be reported.

Appeal from Mercer Common Pleas Court.

Opinion of the court by Chief Justice Lewis, affirming.

Sale of infant's real estate, on petition of guardian, was properly made in this case, as the proceedings, "though not in strict conformity with the law as it then existed, appear to have been fairly conducted, and the sale was necessary for the support and education of appellant."

C. A. & P. W. Hardin for appellant.

Thompson & Thompson for appellees.

UTTERBACK v. WILHOIT, &c.

Filed February 21, 1882—Not to be reported.

Appeal from Woodford Circuit Court.

Opinion of the court by Judge Pryor, reversing.

1. Johnson v. Utley settles the question in this case.

2. Payment of two per cent. interest in advance and agreement to pay eight per cent. in the face of the note, when eight per cent. was lawful if agreed to be paid in writing, rendered the transaction usurious.

3. By contracting to receive a greater rate than the legal rate of interest the lender did not forfeit all interest, but was entitled to the legal rate.

H. C. McLeod for appellant.

Porter & Wallace for appellees.

BARHAM, FOR, &c. v. DEPOSIT BANK OF GLASGOW.

Filed January 21, 1882—Not to be reported.

Appeal from Barren Circuit Court.

Opinion of the court by Judge Pryor, affirming.

Judgment not being palpably against the weight of the evidence can not be reversed.

Boles & Eubank and Hord & Trabue for appellants.

Porter & Ritter and Wm. Lindsay for appellee.

McKEE, &c. v. SCOBEE, &c.

Filed February 23, 1882—Not to be reported.

Appeal from Shelby Circuit Court.

Opinion of the court by Chief Justice Lewis, affirming.

1. Assignment by debtor in contemplation of insolvency, with the design of preferring one or more creditors to the exclusion, in whole or in part, of others, will operate as an assignment and transfer of all the property and effects of such debtor, and enure to the benefit of all his creditors in proportion to the amount of their respective demands, including those which are future and contingent.

2. Surety of insolvent debtor is entitled to the benefit of the assignment of his principal, in common with ordinary creditors, whether he has paid the debt for which he is bound as surety or not.

Bullock & Beckham for appellants.

Caldwell & Harwood for appellees.

ARNOLD'S EX'OR v. COMMONWEALTH.

Filed February 25, 1882—Not to be reported.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Pryor, affirming.

The State need not give affidavit as to the justice of its claim against the representative of a surety on a bail bond.

The statute requiring affidavit as to the justice of a claim against a decedent's estate does not apply to the Commonwealth in a proceeding to enforce the criminal and penal laws.

W. H. Chelf for appellant.

P. W. Hardin and J. Haycraft for appellee.

BARDSTOWN & LOUISVILLE TURNPIKE CO. v. COMMON-
WEALTH, &c.

Filed February 25, 1882—Not to be reported.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Pryor, affirming.

Statute of limitation does not run against the State in this case.

Appropriation by the State for the benefit of a turnpike company, in which the State was a stockholder, on condition that the private stockholders should advance an equal amount and that the appropriation should be repaid before any dividends should be declared, can not be retained by the private stockholders by pleading the statute of limitation, the State being a quasi partner in the common enterprise.

Wm. Johnson for appellant.

P. W. Hardin for appellees.

COMMONWEALTH v. BRIGGANCE, &c.

Filed February 25, 1882—Not to be reported.

Appeal from Fulton Circuit Court.

Opinion of the court by Judge Hargis, affirming.

Indictment must be direct and certain as regards the party charged with the offense.

The names of both defendants appear in the caption of the indictment.

"Only one of them is charged with the offense of breach of the peace by fighting with the other. It is stated in the body of the indictment that the latter joined in committing the acts set forth as constituting the offense charged against the former."

The charge is held to be not sufficiently direct and certain.

P. W. Hardin for appellant.

C. Hughlette Wilson for appellees.

DRY CREEK & COVINGTON TURNPIKE ROAD CO. v. COMMON-
WEALTH.

Filed February 25, 1882—Not to be reported.

Appeal from Kenton Criminal Court.

Opinion of the court by Judge Pryor, reversing.

Turnpike road company is not under absolute legislative control.

March, 1882—6

The legislature has no right, after permitting a turnpike road company to surrender to a city a portion of its road lying within the corporate limits of said city, to require the company, against its consent, to take back said portion of the road.

Benton & Benton for appellant.

P. W. Hardin for appellee.

COMMONWEALTH v. KNOERR.

Filed February 25, 1882—Not to be reported.

Appeal from Fulton Circuit Court.

Opinion of the court by Chief Justice Lewis, reversing.

1. Transcript from city court to circuit court was properly attested as true copies by the judge of the city court, by permission of the circuit court, even after the expiration of sixty days from the rendition of the judgment in this case, the appellees having "within the time prescribed obtained a copy of the warrant and of the judgment and statement of the costs and filed them in the clerk's office of the circuit court and executed the bond required with approved security, and also executed the covenant required in order to suspend the enforcement of the judgment rendered by the judge of the city court."

2. Illegal sale of liquor—"It is no objection that the particular kind of liquor sold is not specified; for if either kind, or the mixture of either, was sold the offense was committed."

C. H. Wilson and P. W. Hardin for appellant.

S. H. Crossland for appellee.

L. & N. R. R. CO. v. COOPER'S ADM'R.

Filed February 28, 1882—Not to be reported.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Pryor, reversing.

Deaf mute walking on railroad track was run over and killed by a train, in this case. Held—That

Those in charge of the train had a right to believe the deaf mute, when seen walking on the track two or three hundred yards in front of the train, would exercise at least ordinary care and caution on his part, and if he failed to do so his death was the cause of his own recklessness and imprudence, unless such employes knew or had, as ordinarily prudent men, reason to believe that the injury would occur unless the train was checked, but—

"If the killing was intentional, or the result of willful neglect, the failure to exercise the proper care by the deceased will not excuse, but the facts upon which their knowledge of danger is brought home to the employes must be made to appear."

"The mere fact that the deceased was seen upon the track is not sufficient to authorize the jury to say that the employes were guilty of willful neglect, or the court to instruct the jury that it was the duty of those in charge of the train, when they saw the deceased on the track, to use the means within their power to prevent the injury."

"If this had been a child on the track the employes should have exercised greater care, * * * but when the party injured is an adult, although de-

ficient in hearing, he must be treated as one of ordinary intelligence unless his misfortunes are known."

Rountree & Lisle for appellant.

Russell & Avritt for appellee.

CAMPBELL v. COMMONWEALTH.

Filed February 28, 1882—Not to be reported.

Appeal from Hart Circuit Court.

Opinion of the court by Judge Hargis, reversing.

1. Misjoinder of offenses—

Malicious wounding of two distinct persons should not be charged in one indictment, although the wounding of both may have been contemporaneous.

Demurrer to such indictment should have been sustained.

2. Appellant can not dismiss his appeal after finding that the decision is adverse to his wishes—"The attorney for the appellant insists that the judgment should be reverse, with directions to dismiss the proceedings and discharge the prisoner, and asks, if this can not be done, to be allowed to dismiss his appeal. We can not consent to such a practice."

I. T. Woodson for appellant.

P. W. Hardin for appellee.

KENTUCKY CENTRAL R. R. CO. v. McMURTRY.

Filed February 23, 1882—Not to be reported.

Appeal from Scott Circuit Court.

Opinion of the court by Judge Pryor, affirming.

1. Facts constituting negligence in action against railroad company not necessary to be alleged.

"The fact that plaintiff was on board the train as a passenger, and the company had undertaken for compensation to transport him to his destination on its road, and that the train ran off the track and injured the plaintiff by reason of the negligence of those in charge of the train, constituted a cause of action, and if what was done by the conductor causing the accident is required to be alleged, it would require the statement not only of a cause of action, but the evidence by which the plaintiff expected to support it."

Under the allegation that the injury to the plaintiff was caused by the negligence and carelessness of the agents and employees of the defendant in running and operating its train, and that by this negligence the train was wrecked and the car in which the plaintiff was riding thrown from the track and the plaintiff's foot mashed, broken and permanently injured, the plaintiff could show, "as proof of negligence, that the employees were running a train with a greater load on some of the cars than they could bear; that the axle on one of the cars became so hot as to melt off, and its heated condition was known to the conductor who, disregarding his duty, failed to use proper precautions, or take any step whatever to avoid the danger."

2. It was competent for the plaintiff to prove that the conductor was told of the heated condition of the box and his reply.

It was also competent for the defendant to prove that when informed as to the condition of the box the conductor gave it as his opinion that he could run it safely to Cynthiana.

But under the circumstances of this case the defendant was not prejudiced by the refusal of the court to allow such proof.

3. The railroad company's liability depended upon the failure of the conductor "to exercise that skill and care in the conduct of the train that one of prudence and caution should exercise when placed in such a position. He must exercise all the vigilance that a prudent man would exercise, skilled in the business, to insure the safe transportation of passengers."

When the conductor saw the danger, "his first duty was to the passengers on the train, and when, as a prudent and cautious man, he saw or should have seen, the danger, it was incumbent on him to stop the train at the station before reaching Cynthiana, and in so doing would have avoided all danger."

4. The criterion of damages "is the right to compensation 'for the injury sustained, and all such further injury, temporary or permanent, that would directly result from the injury complained of.'"

But compensation does not include punishment. The court properly told the jury what facts they might consider in estimating compensation in this case.

5. A verdict for \$8,000 for injury, disabling plaintiff for life, was not excessive in this case.

6. Consent to read affidavit as to evidence of absent witness, as the deposition of such absent witness being given by the adverse party, trial should not be postponed to procure the attendance of such witness unless the party and his attorney state that the "testimony of the witness is important, and that the proper effect of his testimony can not, in a reasonable degree, be obtained without an oral examination in court."

Stevenson & O'Hara for appellant.

L. M. Martin, J. Q. Ward and J. E. Cantrill for appellee.

SMITH, &c. v. BELL & CO., &c.

Filed November 12, 1883—Not to be reported.

Appeal from Greenup Circuit Court.

Opinion of the court by Judge Hargis, reversing.

1. Occupant by trespass of land, pending an action for its division, should have been credited in this case with the value of the lasting improvements made by him (to the extent of the increased rental value of the land over what it would have produced had he made no improvements) by deducting the value of the lasting improvements from the rent arising solely from such improvements and from the damages done by the trespasser to the land, notwithstanding he could not have recovered the value of such improvements, and is not entitled to a lien on the land therefor.

2. \$700 attorney's fees were improperly allowed in this case for the mere resistance to the recovery in an action of ejectment. The court say:

"Reasonable attorney's fees may be recovered where they have been contracted by reason of a malicious prosecution of the plaintiff by the defendant, or the defendant has maliciously attached the plaintiff's property and in all cases of like nature, but for mere resistance to the recovery in an action of ejectment, or an action of that character, we are of the opinion no attorney's fees except those allowed by the statute can be recovered unless some peculiar and a different state of facts from those relied on were shown."

3. Judgment against persons not parties to the action on a forthcoming bond, without any suit or rule against them, was erroneous.

Roe & Roe for appellants.

B. F. Burnett for appellees.

The Court of Appeals decided more than sixty cases in February.

Judge Hines has returned from Florida much improved in health.

The legislature is hard at work upon the various apportionment bills, and other matters of general and local importance. The Superior Court Bill has passed the senate, and it is supposed will be passed by the house in a few days. Such a court will relieve the Court of Appeals and enable it to give the proper amount of investigation, study and consideration to each case decided by it. The investigation, study and consideration of questions to be determined by courts of last resort should never be forced to be too hasty by the pressure of an overcrowded docket, as is the case at the present time with our Court of Appeals.

L. N. Dembitz, in an article in the Kentucky Law Journal, just issued, very absurdly and unjustly characterizes our note to *Vance v. Campbell*, in our January number, as a "bitter onslaught" and "attack" upon the Court of Appeals. We suppose Mr. Dembitz was employed to answer our note and found himself unable to do so except as above indicated, or by making an ugly face at it.

When we differ from the decisions of our overworked Court of Appeals, we have expressed our views freely, but always respectfully, with a view of aiding both the court and the bar of the State to come to a correct conclusion as to the matter discussed, and we pity the independence of the minds of such persons as regard such a discussion as either a bitter onslaught or attack upon the court. We know personally that the court has not, and does not, so regard any of our articles, as we are determined to conduct the Reporter so as to aid and assist the courts and without giving any just cause of complaint.

THE
KENTUCKY LAW REPORTER.

APRIL, 1882.

WHAT INTEREST HAVE THE COLORED CITIZENS OF
KENTUCKY IN THE COMMON SCHOOL FUND?

In an argument made by the senior editor of the Reporter some weeks ago, before the judiciary committee of the senate, he contended that the colored citizens and their children have precisely the same constitutional interest in the school funds of this State that the white citizens and their children have; and that the city of Frankfort is constitutionally and morally bound to expend the same amount per capita, and to make provisions for the education of the colored children, in colored schools, equal to those made for the education of the white children at the expense of the public, and out of the common school fund. Since the above argument was made the charge recently given in the case of *United States v. John M. Bunton* by Judge Baxter, United States Circuit Judge for the sixth circuit, including Ohio, Kentucky, etc., at Cincinnati, has been published in the *Ohio Law Journal* of March 16, 1882, and we republish it below in the Reporter in order that we may present the subject to the most thoughtful consideration of the members of the general assembly and the people generally of this State, and warn them of what may and is certain to be the result of the decision of the Federal court in this State when such a case is presented in it. But read the following:

UNITED STATES v. JOHN M. BUNTON.

In United States District Court, Cincinnati, Ohio.

JUDGE BAXTER'S CHARGE TO THE JURY.

The prosecution was instituted against defendant as superintendent of a district school in Clermont county, Ohio, for refusing to admit the son of a colored man to the school, which is attended by white children, the defendant claiming that there was a school for colored children in the vicinity, accessible to the boy, and to which he should be sent. The case was tried last week before Judge Baxter, at Cincinnati, who charged the jury as follows:

Gentlemen of the jury—It is a great relief to a court, and a great relief to a jury, to have a case tried by counsel who understand what the controlling question is and who are frank enough to move right up to the question and present that case. Upon that the decision of the jury turns, without making it necessary for the court to go back, as it were, and traverse all the law in order to show you what the ruling question in controversy is. If this case had been met in that spirit we would have been through it before dinner, but it is a very small case and in a very narrow compass. There is really but one question for the jury, which I will point out after a while.

A good deal of discussion has been gone into and a good many books have been read in order to satisfy the court, for it was addressed to the court and properly to the court, as it is a question which the court has to decide and not the jury, that there must be a criminal intent to constitute a crime. In the broad sense in which the books intend it that proposition is true. But what constitutes a criminal intent in one case is very different from what it is in another case. A decision is read here by Judge Rives, of Virginia. That case was upon the trial of a juror commissioner, who was indicted because he refused as jurors—he excluded from the jury box—two colored men because or on account of their color, the law denouncing that act as a crime, and authorizing parties to be prosecuted who did that. Now you will see that the essence of that crime consisted not in his excluding the jurors—I mean persons from the jury box—but for doing it on account of their color. The

exclusion of colored men from the jury box might have been because they were regarded as incompetent to serve as jurors, as not having sufficient intelligence, or for some other good and reasonable cause. He could not be indicted for that; but if he did it simply and solely on the ground that they were colored persons, then the law applied, and as in that particular instance the evidence consisted in the motive—not in the exclusion of the jurors, but in the motive which induced him to exclude the jurors—of course the court was bound to pass upon the fact whether he did exclude them from that motive or some other motive.

Well, again, in another case a man is indicted for passing counterfeit money. The statute, I believe, in all cases speaks of a man passing it knowing it to be counterfeit, because any of us may pass a counterfeit bill inadvertently and without any knowledge of the fact. In that case the crime consists not simply in the passage of the bill or offering it in payment to some one, but in the passage of the bill with the knowledge that it was counterfeit. Then the party can not be convicted unless there is proof of what the law, the books, call the scienter—that is, the knowledge—and that is the proper inquiry to be made in cases of that kind. So in an indictment for forgery. The mere fact that I sit down here and draw a note for a thousand dollars, and sign A B's name to it, is not a criminal offense of itself; and the law says: "If done with intent to defraud," if used with the knowledge of the fact that it was spurious—the knowledge or the intent, in that particular instance, is a necessary element to constitute the crime, and in that instance the knowledge must be proven.

Now we will come down to this case. I am cited to a great many other cases of similar character, and in the discussion upon the books the author is treating upon some particular proposition, and his language is applicable to that proposition, and hence when you turn over very often a page or two forward or a little back you find something to the unthinking mind, whose business it has not been to study law or to discriminate, that seems apparently in conflict with this proposition, but when you look to the facts and the difference in principle they are harmonious, and they are both correct. The crime in this case is, after the slaves were emancipated by a military force

and through an amendment of the Constitution of the United States they were made citizens; they were invested with all the rights of citizenship. They have under the Constitution the same rights precisely as you and I have, but being an uneducated race just withdrawn from under the yoke of bondage and turned loose upon the world as full-fledged citizens of the United States, the government, or a majority of the people of the United States who did this thing, felt that it was their duty to throw around the ignorant slave such protection as would be sufficient to guarantee to him the rights with which the Constitution has invested him; because a right, although it be a constitutional right, unless there is some means provided by which to protect that right and protect the parties in the exercise of that right, is entirely valueless. Several provisions of law have been made in order to give this protection. Among others it has been enacted that every person who, under color of any law, statute, regulation, ordinance or custom deprives a person, on account of his color, from his rights, is indictable and punishable in this court.

Now the mere fact that this defendant excluded this colored boy from the privileges of his school would not constitute an offense. There must be more than that. He must have excluded him from his school, and he must have done that under some color of law, or statute, or ordinance, or regulation, or custom of the State. It requires an exclusion, and also that that exclusion should be for the reason which the law gives, on account of his color, and the person who thus excludes must be acting, or claiming to act, under some authority of law of the State, local law, custom, regulation, or statute or ordinance. If, therefore, this defendant did exclude this colored boy from his school, if this colored boy was a resident of the district, and if he had a right to go to that school, in reference to which I will instruct you directly, and if this defendant excluded him from the school, claiming to do so under the authority of the statute which provided for a separate school for colored people, or under some regulation, or custom, or ordinance of the State, and excluded him because he was a colored boy, or for some other reason—he might have been spiteful towards him and exclude him for some other reason—if he ex-

cluded him under color of authority, and because he was a colored boy, then the court instructs you that he would be guilty, and you ought to find him guilty, unless you should find in his favor upon the question of fact, which I would bring to your attention, but which the counsel for the defense did not discuss. This only question in the case has not been discussed.

Now, referring to some portions of the argument, and the positions assumed by counsel in this connection, he proved by four witnesses that defendant is a man of good character and a law-abiding citizen. The law presumed that before he introduced the proof, and the proof only confirms that proposition. And then he reads authorities to the court in order to inform the court what the law is upon that question! Well, the authorities read are all correct enough, but let us see if they have any application to this case. When a proposition of law is announced that is correct, it means that it is correct when there is anything for it to operate upon, when it is applicable to the case that is under trial. The only thing which this defendant is accused of doing is that he excluded this boy from the school, and he did it under the color of the statute relating to the subject, and did it because he was a colored boy. The defendant is introduced as a witness himself, and that is his statement—that he thought the boy had been provided for at another school; that it was his right to apply at the other school; that he had no right to come to his school; that the other school had been provided for colored children, and money set apart for that purpose. In other words, he admits every fact necessary to constitute this case. Now doesn't the jury, in the exercise of its own good sense, see at once that good character has nothing to do with the proposition? If the proof is plain and indisputable that a man did do a particular act, if the party accused comes into the court and admits the fact that he did do a particular act—that is, that he did exclude this person; that he did do it under color of that law which has provided another place for them to go to, and that he did do it upon that ground; that he had not been employed to teach colored people, what use could you make of the fact that he was a man of good character—I mean in passing upon the facts which constitute that part of the case? He certainly is a

man of good character, but if he admits the offense there is nothing for this evidence to operate upon. And the court instructs you that good character, in this particular case, very proper and influential in proper cases, has no application, no bearing, and is entitled to no consideration at the hands of the jury. If the defendant were to deny the facts alleged, if he would say the testimony on the part of the prosecution or government was not true, if he were to raise an issue between himself and the other witnesses, or even stand off and deny the truth of the indictment, then the jury, in passing upon the fact whether he was guilty of the particular matters alleged against him, or not guilty, would very properly be authorized to take into consideration that he was a man of truth, a man of veracity, a good citizen and a law-abiding man; but when they are called upon, first, to decide whether he excluded this colored boy; secondly, whether he did it under color of authority; and, thirdly, whether he did it because he was a colored boy, and the defendant himself, upon his oath, who is examined as a witness in his own behalf, admits these particular allegations are true, the court instructs you that the question of good character and law-abiding citizenship has nothing to do with it.

Now the same remark may be made in reference to his motive. It is proper for you to inquire whether he was moved to exclude the boy on account of his color, and whether he assumed the right to do that, to exclude the boy under any authority of the State statute, custom, regulation or ordinance. You have a right to look at his motives in that particular, and if you find that he had another motive than that stated in the statute, why then the Federal courts would have no jurisdiction over the question. They could not try him for a bare assault and battery. They could not try him for a simple denial of a right unless it was a right arising under the Constitution and the laws of the United States, and unless that right was denied by color of authority, and because the party was a negro. In that respect you have a right to look at his motives, but if he has admitted that it was done on that ground, why then you have no inquiry into his motives at all; he himself admits the motive.

I have stated to you, gentlemen of the jury, that under the Constitution and laws the negro has the same rights as the white man, precisely the same rights in all respects. He is subject to the same obligations, duties and liabilities, and that right has been secured by the amendments to the Constitution. This was a public school, and whether this negro, the father of the boy that was excluded, pay much or little tax, he is bound to contribute to the support and maintenance of that public school; and doing that, he has a right to have his children educated at the public expense in the same way and to the same extent that white children are educated, no more and no less. The legislature of Ohio has authorized the establishment of public schools; that is to say, they have authorized the classification of these school children, and have authorized the negroes to be educated separately, in one school, separately from the white children, and the white children separately from the negro. Now that is no wrong to the negro. The legislature has a right to do that. If you find upon the facts of this case that such school had been provided, which afforded like facilities as the one to which he went and claimed admission, reasonably accessible to him, not exactly--I don't put it upon the ground of exactly as accessible, but if the colored school was established in good faith, supplied with a competent teacher, corresponding in a reasonable degree with the qualifications of the white teachers of the country, and reasonably accessible to this negro, it was his duty to have gone to the colored school, and if he refused to go there, and claimed admission into the white school and was excluded, he has nothing in law to complain of. But if, as has been contended, and this is the question of fact that has not been discussed--at least it has only been alluded to--if you find as a matter of fact, and that is the fact you will pass upon, that this colored school was so remote--too remote for the child of this black man to attend without oppression, and without going over unreasonable and unusual distances; that the school board or trustees of the district--trustees, whoever they may be, whose duty it was to provide these schools, had placed this negro at a disadvantage with his white neighbor--material disadvantage--had required of him, in order to get his education, more than they had re-

quired of others; to travel over this greater distance, which was unusual, they had not provided for him the same accommodation, the same facilities, the same conveniences, or something approximating them, that he could obtain in his home school, if I may so term it, the school nearer to him, then, in that event, he had a right to go to this white school; for if the law is not enforced in that way you will see at once that by this claim of right to classify or send the negro to one place and the white man to another, or provide accommodations or educational facilities for the white man, that you don't give to the negro, the inequalities and the injustice and the wrongs that are inflicted upon the negro, and the violation of that constitutional amendment which was intended to give him protection. Now that is the question of fact that you are to determine, and if you find that that school was sufficiently near home, that it was well appointed, well provided with teachers, reasonably accessible, the court instructs you that this defendant would not be guilty; but if, on the other hand, you find the reverse, then the court instructs you that he had a right to enter the white school.

Now there must be an intent. I told you at the outset there must be an intent to constitute a crime. But the position of counsel might mislead you. The intent necessary to constitute this crime is: Did the defendant intend to exclude him from the school? That is the intent. Did he intend to do that? The fact that he supposed at the time that he had a legal right to do it, the fact that he did not know what the courts would hold, how they would construe this matter, or, in other words, the fact that he did not understand the law of the case, is not an excuse. If he intended to do the acts which in law constitute the offense, then that is the only intention which the law demands in order to a conviction. Counsel said in his remarks to the jury that now, ever since the decision which was made in the civil suit between these parties, tried before me here some time ago, that if the teacher was to exclude the colored boy under the same circumstances, he would be guilty. Gentlemen, the statutes of congress don't change according to the decisions of courts. It is a new idea that the law is one way until the court makes a decision in reference to a matter

of this sort, and then becomes another way after the decision is made—that is, that the statute has a different and more rigid effect now since the decision made six months ago than it had before this decision was made.

If it was possible to give it such a construction, and there is no authority for it, that construction alone would in legal effect abolish the amendment to the Constitution. The law of the case would depend not upon a judicial construction to be made by the judges, but it would be made to depend upon the opinion which the parties themselves might entertain of the law, and one man who understood it correctly would be guilty of a crime, whereas another man who did not understand it, but doing the same thing, would be innocent. Now that ain't the law! The law assumes that every one knows what the law is and is bound at his own peril, in criminal and in civil cases, to know what the law is. It is true they don't all know it, but they are all bound to know it. The law prescribes the rule, publishes it, sends it forth to the country, and they are bound to take cognizance of the law, and it is not a flexible thing, that is one way to-day and is another way six months afterwards, because the court may happen to have given a different construction. The counsel admits to you that my instructions in the other case were correct, and I think they were correct, and they are exactly the instructions that I give you here now. If they were correct, it was because I construed the law as congress intended it to be construed, as it should have been construed, as it ought to be administered, not as to what it shall be in the future, but what it has been in the past, been so since the time of the enactment.

Well, another position is assumed, that this defendant consulted counsel, and counsel advised him that the law was different from what this court instructs you that it is. Well, gentlemen, the legal fraternity to which I have belonged for forty-one years contains a good many sensible and good, useful men; contains a great many men competent to advise, and honest enough to give correct counsel; but then it contains a great many more charlatans, superficial lawyers, honest or dishonest, as the case may be, and I think I may say that my observations in courts for forty-one years leads me to believe that at last one-half of the litigation that we are troubled with in

the courts, arises from the misadvice of counsel. Nevertheless the law, in its tenderness, in some respects gives force and effect to the advice of counsel. If A has B arrested upon the charge of larceny, and B is tried and acquitted, and B then sues A for what is termed a malicious prosecution; that is, for prosecuting him when he was innocent, and without sufficient probable cause to justify the prosecution, A, the defendant in that civil suit, may show in his defense that he acted upon sufficient cause, and in good faith, and in an action of that kind if A can show that he made a fair presentation of his case to an attorney in good standing, and that counsel advised him that it was sufficient ground for prosecution, and that he thereupon, acting in good faith upon the advice of counsel, instituted the prosecution, why, that would be a good defense. But that has not been carried into the criminal law. We don't seem to need it now. We don't seem to need defenses of that kind. They have got plenty of other defenses available. But if it became necessary, a man might defend for murder, or assault and battery, or anything else, for I fancy that any one evilly inclined, could find in Cincinnati, or anywhere else in this broad country, some man to advise him to do whatever he wanted to do. That is the rule which some counsel act upon. They generally find out what a man wants to be advised, and then they advise him; and he is the man that pleases him. Now it may be that this defendant, and I expect he did, advised with counsel, and I expect his counsel instructed him that he had a right to exclude this negro from the school, and I take it, am willing to concede, that he acted in the matter in the utmost good faith; that he thought he was doing what he had a right to do; but the court charges you, gentlemen, that notwithstanding all of that, if he did what the act of congress forbids him to do, and did it under color of authority, and because this boy was a colored boy, that it would be no excuse; he would still be guilty. It would be a matter to address itself very strongly to the consideration of the court. The punishment prescribed by the statute is that the court may inflict a thousand dollars fine and twelve months imprisonment; and in a proper case this court would do that. The court can not go beyond that in any case;

but the court is not bound to do that; it is bound to exercise its own judgment in a particular case. It may fine as low as a penny, or imprisonment for twenty minutes, or either one. It is a matter within the discretion of the court. There is no minimum of punishment, but there is a maximum, beyond which the court can not go; and we are, gentlemen, all under obligations to avoid, as far as possible, anything like personal feeling, any personal interest. We are under oath, both the court and jury, to administer the law just as we find it. The court is to determine the law and the jury is to pass upon the fact.

Now the issue, and the only issue, is whether this colored school that had been provided, and which the statute had authority to provide, was reasonably accessible, and gave to this boy the same facilities, educational facilities, that he could have obtained at the other, or something approaching it. If it did, then this defendant is not guilty; if it did not, then the court instructs you that, upon your finding that fact, he would be guilty as he is charged in the indictment. Take the case gentlemen.

The jury disagreed and were discharged.

Channing Richards for the government.

John Johnston and H. J. Buntin for defendant.

KENTUCKY COURT OF APPEALS.

TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY v. COMMONWEALTH.

(Filed February 28, 1882.)

1. Indictment for a public nuisance against the trustees of the Cincinnati Southern Railway, alias the Cincinnati Railway Company, committed "by leaving a hand car upon said road and hanging upon said car buckets and clothing, by reason of which, and the location of said car upon the road, the horses of people using and passing upon the public road were frightened, and the lives of persons endangered and the public road obstructed," was good, and the judgment against them thereon is affirmed.

2. The trustees of the Cincinnati Southern Railway "should be held liable like railroad corporations for the violation of the laws of this State," * * * "and may be indicted for any violation of law a railroad company may be."

The indictment in this case was against "the trustees of the Cincinnati Railway, alias the Cincinnati Railroad Company."

"In the absence of any suggestion by the defendant that the 'trustees of the Cincinnati Southern Railway' are different from the 'Cincinnati Railway Company,' by motion to compel the Commonwealth's attorney to elect which he would prosecute, or otherwise, this court can not presume that the latter is anything else than an alias, or another name for the former, or that there is in fact more than one defendant.

Appeal from Mercer Circuit Court.

Opinion of the court by Chief Justice Lewis.

The indictment in this case is for the offense of a public nuisance, and the verdict of the jury and judgment of the court being against the defendant, this appeal is prosecuted.

It is contended that the indictment is defective and the demurrer to it should have been sustained upon the grounds: First, that the facts stated do not constitute a public offense; and second, that the trustees of the Cincinnati Southern Railroad are not a corporation; not indictable as such; but are amenable for a violation of law only individually.

The particular circumstances of the offense charged in the indictment are that the defendant did, on the 16th day of October, 1880, unlawfully obstruct a public road in Mercer county, at a point where it crosses the Cincinnati Southern Railway, by leaving a hand-car upon said road and hanging upon said car buckets and clothing, by reason of which, and the location of said car upon the road, the horses of people using and passing upon the road were frightened and the lives of persons endangered and the road obstructed.

"Public or common nuisances," as defined by Blackstone, "are a species of offenses against public order and economical regimen of the State; being either the doing of a thing to the annoyance of all the king's subjects or the neglecting to do a thing which the common good requires. * * * Of this nature an annoyance in highways, bridges or public rivers, by rendering the same inconvenient or dangerous to pass, either positively, by actual obstruction, or negatively, by want of reparation."

A public road is a way established and adopted by proper authority for the use of the public, and over which every person has a right to pass and to use for all purposes of travel or transportation to which it is adapted and devoted. "And

though any temporary use of a highway or street that is rendered absolutely necessary from the necessities of trade or erection of buildings, that do not unnecessarily or unreasonably obstruct the same, is lawful, and temporary obstructions, arising from accidental causes, do not render a person liable for a nuisance, provided no unreasonable or unnecessary delay is permitted, still no cause whatever will justify any unreasonable use of a public road or street." (Ward on Law of Nuisance, section 258.)

To secure the full use and enjoyment of a public road, it is necessary that it be always open and unobstructed. The offense of obstructing it is not, therefore, determined, necessarily, by the length of time the thing that worketh hurt, inconvenience or damage to the public, continuous or by the number of times it may be repeated; nor is it necessary, in order to constitute the offense, that actual injury be suffered by any person. It is no more necessary that a public road shall be repeatedly, continuously or habitually obstructed by a person to render him guilty of the offense of a public nuisance than that any other violation of law shall be in order to make the offense complete. But subject to the exemption arising from absolute necessity and accidental causes before mentioned the offense is committed where, by actual obstruction or impediment, a public road is rendered by any person inconvenient or dangerous to pass.

To secure the reasonable and proper use and enjoyment of the public road by the public and of the railroad by its owners, each must be required to observe the maxim of law that every person is restricted against using his property to the prejudice of others. And as it is plain that the railroad and the public road can not, at the crossing place, both be occupied and used at the same time, even partially, the law, for manifest reasons, makes it the duty of persons traveling upon the public road to stop until an approaching train or car passes that point. But the public, on the other hand, is entitled to the unobstructed use of the public road at the crossing place when it is not actually occupied or about to be occupied by moving trains or cars.

To concede to the owners of railways the right to stop their trains or cars at the place the public road crosses the railroad

would not merely render the public road inconvenient and dangerous, but in many cases useless. Not even business necessities will authorize the owners of railroads to thus obstruct the public roads.

In this case the hand car appears to have been stopped and left stationary at the crossing place, and was an actual impediment and obstruction of the public road. And as such obstruction was intentionally created and did not arise from accidental causes the offense of a public nuisance was complete. The Commonwealth was not confined to the day alleged in the indictment, but had the right to prove the commission of the offense on any day within three months before the finding of the indictment. And although it was not necessary to prove that the road was obstructed more than one day or upon more than one occasion, the defendant was not prejudiced thereby, because the jury was instructed by the court that they were authorized to find the defendant guilty of only one alleged nuisance.

The indictment was originally against the Cincinnati Southern Railway, but the attorney for the Commonwealth asked and obtained leave of the court to prosecute the case against the defendant by the name of the trustees of the Cincinnati Southern Railway, alias the Cincinnati Railroad Company.

Counsel for appellant contend that the trustees of the Cincinnati Railway are not a corporation, and can not be indicted as such, but for a violation of law must answer individually.

Although they do not possess all the attributes of a corporation, still they are not limited to the powers possessed by mere trustees of an express trust or relieved of the responsibilities and duties imposed upon railroad corporations. For by special act of the general assembly they have the power to sue and be sued, contract and take and hold property and convey and transfer the same by the name of the "Trustees of the Cincinnati Southern Railway." No other construction can be put upon the act giving them the right of way through the State and all the powers and privileges and franchises possessed by other corporations to build, equip and operate or lease the railroad when built, than that they should be held liable like other railroad corporations for the violation of the laws of the State.

The title by which they may sue and be sued is prescribed, and to secure their full and complete responsibility for a violation of the laws of the State, as well as wrongs done to individuals, they are required by the act to keep an agent, upon whom process may be served, in every county through which their road runs, and it is made a condition of the enjoyment and exercise of the rights, privileges and franchises conferred by the act that they shall submit to the jurisdiction of the courts of the State and have no right to remove any case therefrom to the courts of the United States, or to bring a suit against a citizen of the State in the United States courts.

In every material respect they are made a corporation by the act referred to, and may be indicted for any violation of law a railroad corporation may be.

The next error complained of is that the court improperly refused to give instruction B asked by appellant. That instruction is substantially, that if the hands working on the railway were not under the control of the Cincinnati Railroad Company, or if the hand car did not belong to said company, or was placed on the public highway by the hands or operatives under its control, they must find for said company. As before stated, the indictment is against "the trustees of the Cincinnati Southern Railway, alias the Cincinnati Railroad Company."

There is nothing in the record to show that the "Cincinnati Railway Company" is distinct from the "trustees of the Cincinnati Southern Railway;" or that there is a corporation or association by the name of the "Cincinnati Railway Company;" or that it is anything else than an alias for the "trustees of the Cincinnati Southern Railway."

It is true one of the witnesses, Durham, stated that the trustees of the Cincinnati Southern Railway, under their contract with the lessees, the Cincinnati Railroad Company, had to keep the roadbed in order and that the Cincinnati Railroad Company had nothing to do with the repairs on the road; that it only runs the trains on the road, the hands repairing the road being under the control and management of the trustees of the Cincinnati Southern Railway.

But in the absence of any suggestion by the defendant that the "trustees of the Cincinnati Southern Railway" are different from the "Cincinnati Railway Company," by motion to compel the Commonwealth's attorney to elect which he would prosecute, or otherwise, this court can not presume that the latter is anything less than an alias or another name for the former; or that there is in fact more than one defendant.

The instruction refused being asked upon the assumption that there are two corporations or companies, which is not satisfactorily shown by plea or otherwise to be the fact, was properly refused.

We perceive no error in the instruction given by the court.

Wherefore, the judgment of the court below is affirmed.

Durham & Jacobs for appellant.

P. W. Hardin for appellee.

LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY v.
COMMONWEALTH.

(Filed March 2, 1882.)

1. It is a public nuisance for trains on railroad to cross a public road without habitually giving such signals as are necessary for the safety of the public, to warn them of the danger of approaching trains.

In such places where trains pass frequently and rapidly the best warning, reasonably within the power of the railroad managers, should be given.

2. No contributory negligence in public nuisance.

"When a nuisance is public, annoying the members of the community generally, by the careless and incautious exercise of a hazardous and dangerous business in their midst, the contributory negligence of any or all of them furnishes no excuse or defense to a prosecution for any injury to the public generally."

Evidence "to prove the absence of casualties on other roads conducted in a more populous community, and at intersections of highways more generally used than the crossings of the turnpike," was properly excluded in this case.

Appeal from Kenton Criminal Court.

Opinion of the court by Judge Hargis.

This was a prosecution for a common law nuisance, charged to have been committed by the appellant at a crossing of the turnpike and its railroad, by habitually running its trains at an unsafe and unreasonable rate of speed, and so rapidly as to endanger, hazard and injure persons traveling upon the turn-

pike, without giving warning signals, or taking precautions to avoid injuring such persons by approaching trains.

A trial was had, and a verdict and judgment rendered against the appellant for \$500, from which it prosecutes this appeal, and asks a reversal of the judgment because of erroneous instructions and an improper exclusion of evidence from the jury, and a refusal to sustain the motion in arrest of judgment.

The instructions asked by the appellant and rejected by the court in effect negatives the legal sufficiency of the alleged and proven facts, and applies to this character of case the doctrine of contributory negligence.

This court said, in the case of the L. & N. R. R. Co. v. Commonwealth, 13 Bush, 890, that a railroad company "may lawfully run its trains at any reasonable rate of speed, but it is bound to take reasonable precautions to prevent the enjoyment of its privilege from injuring those crossing its road upon public highways."

This general rule must be considered the settled law of this State, and, being sound in principle, we perceive no reason for departing from it.

Tested by it the indictment states a public offense, and substantially sets forth a public nuisance, and the motion in arrest of judgment was, therefore, properly overruled.

The evidence shows that the turnpike is daily used in travel by a large number of people on horseback and in vehicles over the crossing. Some days as many as one hundred and fifty people thus travel over it. The turnpike is the main thoroughfare from the city of Covington to the town of Independence, whither the public officers, attorneys at law and others go to transact the ordinary official business of the county. And that the appellant ran as many as four trains a day over the crossing, at the rate of fifteen to twenty miles an hour, and the formation of the country at the crossing prevented persons approaching it along the pike on one side of the railroad from seeing trains until they come within twenty-four to fifty steps of the crossing. This evidence clearly establishes the fact that the safety of the numerous persons passing over the crossing

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requires that warning signals should be given of the approach of trains.

The jury by their verdict in effect found that the appellant habitually failed to give such signals, and as they were necessary to the safety of the public from danger of approaching trains, the appellant was legally convicted unless the finding of the jury is without evidence to support it.

This is evidence of failure to give any warning signals on several occasions, and the testimony introduced by appellant to establish the custom of ringing the bell or sounding the whistle on the approach of trains to the crossing does not show that such warning signals were universally given, and it lacks some of the elements of certainty.

And the jury having found that the evidence was sufficient to establish that dereliction of duty, we are not inclined to disturb their verdict, as it is not without evidential support, as the frequency and rapidity of the passing trains required the best warning, reasonably within appellant's power, to be given, by the use of the ordinary signals for such purposes to the public of the proximity and approach of such trains.

The instructions given were in accord with the law and applicable to the facts of this case, but those refused did not contain the law suited to the facts and quality of this accusation.

When a nuisance is public, annoying the members of the community generally by the careless and incautious exercise of a hazardous and dangerous business in their midst, the contributory negligence of any or all of them furnishes no excuse or defense to a prosecution for any injury to the public generally.

The greater the peril to which the public is exposed the more precaution should be taken by those in control of the power productive of the hazard. And whatever may be the conduct of individuals, whether incautious, negligent or reckless, neither railroads nor any others are thereby exempted from the duty of so exercising their rights as not unnecessarily to imperil the safety or impair the privileges of the public, nor can they escape responsibility for neglect of duty on the ground that individual members of the community unnecessarily imperil their own safety.

The principles of law found in section 478, 2 Greenleaf's Evidence, which appellant's counsel insists are applicable to a public nuisance, relate to an action by a private individual for an injury to his person or property growing out of acts which might amount in fact to a public nuisance, and as the action is not for an injury to the public the doctrine of contributory negligence applies. Where the injury sought to be remedied is to the rights of the individual alone, he ought not to recover damages if his contributory carelessness caused the injury, and it can not make any difference, so long as the individual complains in his own right, that the injury affects the whole community, but the rule is different when the public is the complainant.

Then what was merely a civil injury to the individual becomes more a public offense, which, being impersonal, can not be excused by the contributory acts of persons.

The appellant offered to prove the absence of casualties on other roads conducted in a more populous community, and at intersections of highways more generally used than the crossings of the turnpike in question, and the evidence was excluded, and we think correctly, because it was irrelevant to the issue in this case, which was confined to the appellant's guilt or innocence of the offense charged in the indictment, and illustrated none of the legitimate questions involved in the trial.

Therefore, the judgment must be affirmed.

M. J. Dudley for appellant.

W. W. Cleary and P. W. Hardin for appellee.

TONG, &c. v. EIFORT, &c

(Filed March 7, 1882.)

1. Mortgage, embracing homestead, in which the mortgagor's wife did not unite, created a lien upon the land subject to the homestead exemption.

When the homestead was set apart, and the balance of the land was sold in the action to enforce the mortgage, the lien of the mortgagee was exhausted.

2. Homestead set apart in action to enforce a mortgage may be sold and conveyed absolutely by the mortgagor and his wife.

Such a conveyance of the homestead, with or without a valuable consideration, is valid, regardless of the claims of the grantor's creditors, it being exempt from their demands.

3. Personal judgment against heirs for debt of their ancestor was erroneous in this action, in which it was not alleged that they had received assets from such ancestor.

Appeal from Greenup Circuit Court.

Opinion of the court by Judge Hargis.

Wm. Tong executed a mortgage on a tract of land, which embraced his homestead, to Rachel Eifort, to secure the payment of \$1,000, which she had lent to him.

His wife did not subscribe or acknowledge the mortgage.

Thereafter an execution was levied on said land, and six acres, including the dwelling house, being first set apart as a homestead to Tong, the remainder was, under the execution, sold subject to the mortgage.

Subsequently Tong and wife, in consideration of past services and an agreement to clothe, support and maintain them during their natural lives, sold and conveyed the homestead in fee simple to Henry Tong and his sister, Mrs. Cartwright.

Mrs. Eifort and her husband sought to foreclose her mortgage during the lifetime of Wm. Tong, who died pending the action, which was revived against the widow and heirs.

Two of them, the vendees in fee of the homestead, asserted title thereto by appropriate pleadings, which Mrs. Eifort and her husband controverted, and alleged that their purchase was fraudulent.

No testimony was taken by either party, and the court upon the pleadings and exhibits, which consisted of the various conveyances, adjudged that the whole tract, including the homestead, be sold subject to the right of occupancy by Tong's widow and children during her natural life, and also rendered a personal judgment against the widow, son, daughter and son-in-law of Wm. Tong for the amount of Mrs. Eifort's mortgage and the taxes for two years which had become due upon said land.

From that judgment the widow and children appeal.

And the first question is, whether the mortgage to Mrs. Eifort conveyed to her the homestead of Wm. Tong.

Section 13 of article 13, chapter 38, General Statutes, has been hitherto construed by this court in the case of *Lear, &c. v.*

Totten, &c., 14 Bush, 103, the facts of which are similar to those of this case.

It was held in that case, Totten having executed a mortgage embracing the homestead in which the wife did not unite and subsequently joined his wife in an absolute sale and conveyance in fee of the homestead, that the only right the mortgagees acquired was a lien on the land, subject to the homestead exemption, and that when the homestead was set apart and the balance of the land sold the lien of the mortgagees was exhausted.

The reason given in support of that opinion is this, that "the creditor can not subject the homestead to the payment of his debt by reason of any mortgage unless the exemption is waived as provided by statute."

And the statute expressly says that "no mortgage, release or waiver of such exemption shall be valid unless the same be in writing, subscribed by the defendant and his wife and acknowledged," etc.

The mortgage by Wm. Tong did not convey his right or interest in the homestead, simply because the mortgage was not subscribed and acknowledged by his wife in conformity to the requisitions of the statute. And, as held in the case cited, there is no reason why Tong had not the right to sell it, as he might have done had no mortgage been executed.

The sale and conveyance to the son and daughter was absolute, and although the recital of a valuable consideration in the deed is no evidence against the appellees, who were neither parties nor privies to it, the conveyance is valid, as the grantor had the right, with or without a valuable consideration, to sell and convey his homestead, regardless of the claims of his creditors, it being exempt from their demands.

The appellees did not allege in any of their pleadings that the appellants, or either of them, had received any assets from their ancestor, hence the personal judgment against them for his debts was erroneous. (Anderson, &c. v. Billis' Adm'r, 2 Duvall, 388.)

Henry Tong alleged, and it was not denied, that he had paid \$41 of the taxes which Mrs. Eifort had discharged, and he should have been credited with that sum. The failure of the

court to allow this credit was not a clerical misprision, but an error of law, because the pleading of the appellant, Henry Tong, entitled him thereto, and the appellees nowhere stated in their pleadings the amount or acknowledged the credit.

Therefore, the judgment is reversed and cause remanded for further proceedings consistent with this opinion.

Roe & Roe and T. H. Payne for appellants.

E. F. Dulin and B. F. Bennett for appellees.

PADUCAH & ELIZABETHTOWN RAILROAD COMPANY
v. COMMONWEALTH.

(Filed March 9, 1882.)

1. Indictment of railroad company for a public nuisance, alleged to have been committed by neglecting to keep in repair the crossing where its road intersects with the Leitchfield and Elizabethtown public highway, although not verbally accurate was sufficient.

Where a railroad company lays its track across a public highway it has control over the full extent of its right of way, and becomes responsible to the public and individuals for injuries resulting from a failure to repair or from unskillful repairs of such crossing, and—

It was the railroad company's duty to keep the crossing and its immediate approaches in such repair as would enable the public to use it with reasonable security and convenience.

2. Verdict decided by lot is forbidden, and for this reason the judgment appealed from is reversed in this case.

Appeal from Grayson Criminal Court.

Opinion of the court by Judge Hargis.

The appellant company was indicted for a public nuisance, alleged to have been committed by neglecting to keep in repair the crossing where its road intersects with the Leitchfield and Elizabethtown public highway.

The facts stated in the indictment constitute a public nuisance and the allegations thereof are legally sufficient, although not verbally accurate, yet they are so plainly stated that a person of ordinary understanding would know what is intended.

The evidence establishes, with reasonable certainty, that the crossing was very muddy and miry, and that the iron rails of appellant's road were as much as six or eight inches above the level of the highway, so that it was difficult to draw wagons

and vehicles up over them, and that it was dangerous to animals and persons to travel over the crossing, which was permitted to remain so out of repair for at least six weeks before the indictment was made.

Soon after the indictment the appellant repaired the crossing and has kept it in good order ever since.

From a verdict and judgment for \$700 against it the appellant has appealed, and insists that it was not bound to repair that part of the crossing outside of and approaching the rails of its road, although within thirty feet of them and embraced by the company's right of way, but that the duty of repairing that portion of the crossing belonged exclusively to the surveyor of the public highway.

Any authorized use of the highway, in the absence of special authority under the charter, must be presumed to have been granted on the condition that its exercise should be consistent with the establishment of the highway and accordant with its use by the public.

The restoration of highways with which railroad companies have interfered is generally regulated by statute, but where there is no statute the common law requires that the railroad companies should restore them to such condition as will not impair their usefulness, "for it can scarcely be supposed that the legislature intends in any case to allow a railroad company needlessly, and permanently, to destroy a public way." (Section 452, *Sherman and Redfield on Negligence*.)

And it would seem to be a necessary corollary from this rule that the railroad company should not be afterwards permitted to destroy the usefulness of a public way by allowing its own road, and the approaches thereto, to become dangerous for the want of repairs.

Where an individual or railroad company permanently occupies a highway or street which is a public road, they are bound to keep the portion occupied by them "in such a reasonable state of repair that travelers may safely pass over them." (Section 357, *Ibid*.)

And in discussing this question the court said, in *Oakland R. Co. v. Fielding*, 48 Penn. St., 320, that it was the railroad company's duty to keep the street, where the injury occurred

and its road occupied it, in good repair, and they are primarily liable for an injury occasioned by the want of repair.

It is the result of several authorities that a railroad company, having undertaken to lay down its track along a street which is a public road, is bound to lay it down properly, and to keep it in a proper condition (1 Daly, 148; 9 N. Y., 163; 1 Hilt., 486). So where a railroad company lays its track across a public highway, reason and necessity unite in demanding that the company should have paramount control over the full extent of its right of way, and the right to make and regulate the repairs necessary to the use of crossings by the public, and, as a consequence of this authority, become responsible to the public and individuals for injuries resulting from a failure to repair, or from unskillful repairs of such crossings.

For if overseers of highways traversing railroads are either admitted or required to enter the space covered by the company's right of way uncontrolled by it, for the purpose of repairing the crossings or approaches to them, disastrous consequences might result to the company from the negligence or unskillfulness of overseers without the power or privilege to avoid them.

For these reasons we think it was the company's duty to keep the crossing and its immediate approaches in such repair as would enable the public to use it with reasonable security and convenience.

But the appellant maintains that the verdict was decided by lot and was not a fair expression of opinion by the jurors.

This was one of the grounds relied on for a new trial, and in support of it the affidavits of four members of the jury were read on the trial of the motion.

They swear that under the influence of one of their number who said the practice was allowable, each juror put down on a piece of paper the amount of fine he thought ought to be assessed, the whole were added together, and the result divided by twelve, and the sum so found was \$700, for which the verdict was rendered.

They state that before the verdict was thus ascertained they agreed that it should depend upon the result of the division, and the amount of the verdict was, in their opinion, more than was right.

Some of the jurors set down sums as high as \$3,000, which was manifestly unjust, excessive and the result of passion.

A verdict thus obtained and given is highly reprehensible, and the consequence of a decision by lot which is forbidden by section 271, Criminal Code, that provides "if the verdict have been decided by lot, or in any other manner than by a fair expression of opinion by the jurors," it shall be a cause for a new trial.

And for the purpose of effectively destroying the practice of finding verdicts by lot in cases of felony and misdemeanors prosecuted by indictment the Code provides, by section 272, that a juror may be examined to establish that the verdict was made by lot.

While we think the necessity for preventing such verdicts is great, we also recognize the danger in overturning verdicts by the evidence of those who have solemnly agreed to them in the privacy and sanctity of the jury room, yet when the evidence of the jurors is clear, undoubted and uncontradicted that the verdict was decided by lot, it ought to be set aside.

Verdicts found by lot are the issue of ignorance, passion or indifference to the rights of life, liberty and property, and shows an utter disregard for the rules of law and fair deductions that should be made from the evidence, and they should not be tolerated in cases of this character.

Therefore, the judgment is reversed and cause remanded, with directions to grant appellant a new trial.

H. C. Pindell and P. H. Darby for appellant.

P. W. Hardin for appellee.

BELL v. KEACH.

(Filed March 11, 1882.)

1. Housekeeper with a family—In legal contemplation, whoever it is the natural or moral duty of the debtor to support or is dependent upon him for support, may be considered as a member of his family.

A bastard child constituted part of the family in this case.

See original opinion in this case, ante, 520.

Appeal from Jefferson Common Pleas Court.

Chief Justice Lewis delivered the following response to a petition for rehearing:

The only condition or qualification required of a debtor who claims the benefit of the exemption laws is that he shall be a bona fide housekeeper with a family.

In legal contemplation whoever it is the natural or moral duty of the debtor to support, or is dependent upon him for support, may be considered and treated as a member of his family. Accordingly it has been consistently held that the infant brother or sister or aged or helpless parent of the debtor may constitute a family in the meaning of the law; for public policy and the interests of society require that the humane provisions of the exemption laws, in the absence of positive restrictions, should be thus extended and applied.

The same reasons that exempt from execution certain property of the debtor, in order that he may be enabled to support his dependent brother, sister or parent, require that he should likewise be protected and encouraged to reclaim, support and bring up in proper courses his bastard child.

In an opinion such an interpretation of the exemption law is demanded by humanity and public policy, and is consistent and reasonable.

The petition for rehearing is, therefore, overruled.

M. A. & D. A. Sachs for appellant.

J. L. Clemmons for appellee.

BARBEE v. FOX.

(Filed March 16, 1882.)

1. Three years' time to redeem land sold to satisfy a contractors' lien under the charter of 1851 of the city of Louisville was required to be reserved by the court confirming the sale, not by the court decreeing the sale.

See original opinion in this case, ante, 426.

Appeal from Louisville Chancery Court.

Chief Justice Lewis delivered the following response to a petition for rehearing:

By the 5th section, 7th article of the statute, under which the property of appellees was sold, it was made the duty of the court confirming, not the court decreeing, a sale of it to reserve in the order of confirmation their right to redeem at any time

within three years from the date thereof, and to also prescribe the terms upon which they might exercise that right. But the order of confirmation made June 24, 1870, contained neither a reservation or recognition of the right, but was made absolute and unconditional.

By the same section it is provided that the court shall not cause a conveyance of the property to be made to the purchaser until the time for redeeming has expired. But the court, in the same order, directed the commissioner to then execute a deed to the purchaser, Barbee.

Barbee had no right to the possession of the property until the expiration of three years from the date of the order of confirmation, and then only upon the failure of appellees to redeem. But he held the possession from 1857 until 1879, when the judgment now appealed from was rendered, undisturbed by the order of June 24, 1870.

So that if, after the expiration of sixty days from the date of that order, when under section 800, Myers' Code, the power of the court to vacate or modify it ceased, appellees had offered to redeem the property they would have found appellant Barbee in possession, claiming under a deed made in pursuance of an order that the court was then without the power to set aside, and their right to redeem ignored, if not adjudged to have terminated.

There is no other way to account for such palpable violation of the statute except upon the idea that the court, when the order of June 24th was made, was of the opinion that the right of appellees to redeem had expired at the end of three years from the date of the sale made in 1857, and did not then exist at all; and it is difficult to avoid that conclusion if, as counsel for appellant contends, the reservation of the right to redeem made in the judgment for the sale of the property is to be considered as a substantial and sufficient compliance with the statute.

The legal effect of the order of June 24th was to make the right of appellees to redeem questionable, if it was not conclusive against them, and to compel them, though willing and able to redeem, to resort to proceedings not required by the letter or spirit of the statute in order to recover of appellant possession

of their property, and to divest him of the title which the court had prematurely and improperly caused to be conveyed to him.

The limitation of three years, therefore, did not begin to run until the judgment appealed from was rendered, when, for the first time, the right to redeem was recognized and the free and unobstructed exercise of that right provided for in the manner required by the statute.

The petition for rehearing is overruled.

Geo. B. Eastin and Russell & Helm for appellant.

J. R. Boone for appellee.

BERRY v. PUSEY.

(Filed March 25, 1882.)

1. Abatement—Action against the owners can not be pleaded in abatement in an action against the captain of a steamboat, on an alleged contract made by the captain, under the circumstances of this case.

2. Physician treating patient by request of the captain of a steamboat, who left the patient at his office with the request that he should treat him, is entitled to recover for his services against such captain.

3. Objection to verdicts, because not signed by the foreman of the jury, in a civil action is unavailable, when first made in the Court of Appeals. Such objection should be made in the trial court at the proper time.

Appeal from Meade Circuit Court.

Opinion of the court by Judge Pryor.

It is evident from the history of this case, as detailed by the witnesses, that the appellant, either for himself or those he was representing, undertook to have young Bayard taken care of and treated by medical skill, on account of the injury he had received by reason of the accident occurring on the boat of which the appellant was captain.

This injury seems to have been the result of negligence on the part of the owners of the boat or its employes, and the claim of Bayard for damages afterwards compromised, but whether so or not the young man was taken to Brandenburg at the instance of the appellant, and from what transpired at the time both the young man and his parents had the right to believe that the appellant, either for himself or the company for

which he was acting, was assuming the liabilities that must necessarily arise from the medical treatment of the injured boy.

He took him on his boat to Brandenburg and had him carried to the office of Dr. Shernal, the physician of the young man's family, and the doctor being absent, he was carried by the appellant and others to the office of Dr. Pusey, the appellee. This surgeon being also absent, and the appellant being desirous of pursuing his journey with the boat, had the young man left at the office of the appellee, with instructions to have every necessary attention given him and have him ready to be sent home on the boat going down that night. The appellant leaving for his boat, the appellee came to his office, and finding the young man there, carefully and skillfully dressed his mangled limb and had him in such a condition as to enable him to go back to his home the same evening, in accordance with appellant's request, on the return boat. This was the substance of the testimony introduced by the appellee, and the principal error complained of is the refusal of the court to instruct the jury to find for the defendant. We think that motion was properly overruled as the facts of this case, although Pusey may never have seen or even known the appellant, authorized the verdict against him. The appellant, it is true, testified after the motion for a nonsuit was overruled, denying any employment of the appellee or any authority given others to employ him, still the facts were all before the jury and it is their province alone to pass upon such questions. The institution of an action originally by the appellee against the packet company and its then pendency could not be pleaded in abatement to this action, as the parties were not the same, nor was it conclusive against the claims asserted against the appellant.

Pusey had the right to presume that, as the appellant was the captain of the boat and as such the agent of the company in the transaction of its business, the company would voluntarily assume the payment of the bill, and may have supposed that the company was legally responsible to him for the debt; but when it appeared that the appellant denied any authority to make the employment and the suit against the company was virtually abandoned, the question arose as to who was liable under the facts of the case. The young man occupied no such relation by blood or employment to the appellant as would

create an implied promise to pay, but he did bring the young man to the office of the surgeon to have his wound examined and dressed by him, that had originated, as was supposed at the time, from some negligence of those in charge of the boat. Having carried the young man to the office of the surgeon, the appellant left instructions to have him attended to so that he might return on the evening boat. This was done and the surgeon should be paid, and upon the facts of this case the jury had the right to say that the employment was made by the appellant.

Several interrogatories were propounded by the appellee, or at his instance, to be answered by the jury; also others propounded by the appellant.

The third question propounded by the defendant and appellant was: "Did the defendant, Berry, employ the plaintiff, Pusey, to perform the services charged?" The court at the time told the jury that before they could answer this question in the affirmative they must believe that the services were rendered at the instance and request of the defendant, and that to arrive at a conclusion they should take into consideration all the facts and circumstances proven in the case. It is certain that the plaintiff had the right to ask for an instruction, similar in effect, bearing upon the general issue as made. This was in fact the issue without the aid of a special interrogatory, and we perceive, for this reason, no objection to the instruction. In fact the special interrogatory needed some explanation by the court, as the jury might have inferred that the presence of the defendant at the time was necessary to the employment, or that a special authority in express words had been given to others to employ the appellee. Besides, the interrogatories propounded by the defendant not only embraced the controlling facts in the case, but the jury was required to answer questions that, if responded to the one way or the other, could not have affected the finding, but conduced to confound the jury in their efforts to arrive at the truth. The special interrogatories authorized to be propounded, such as the court is required to propound at the instance of either party, are such as will elicit a response to the existence or nonexistence of certain alleged facts, the truth of which, if established, must control the verdict.

In this case the jury, at the instance of the defendant, was required to answer whether or not the appellee knew the appellant, and whether the appellant knew the appellee. The response to the questions might have been either way and still not inconsistent with a verdict either for the one party or the other. Did he employ the plaintiff or authorize any one else to employ him to attend to the injured man? Did he, when leaving, give instructions to those present to have the doctor administer to the patient? These questions, if answered in the negative, would be inconsistent with a verdict for the appellee, and, if answered in the affirmative, either question must be consistent with a verdict for him. It is the controlling facts of a case that the jury may be called upon to establish or negative by a response to a special interrogatory, and not the mere evidence as to the existence or nonexistence of these facts.

It is also urged as a ground for a reversal that neither the general or special verdict was signed by the foreman of the jury. We think this provision of the Code is merely directory, particularly in civil cases, and certainly the objection comes too late after the jury has been discharged. The jury, when the verdict in this case was returned into court, heard the answer to the special interrogatories read by the foreman, and the verdict was then handed to the clerk, and again read by him, and the jury asked if it was their verdict and an affirmative response was made. The verdict was then entered of record and made the judgment of the court, and is binding on the parties to it. We perceive no error to the prejudice of the party complaining in this case.

Lewis & Farleigh for appellant.

Benter & Brashears and T. B. Farleigh for appellee.

COMMONWEALTH v. GREEN.

(Filed March 28, 1882.)

1. Indictment should not always follow the language of the statute.

Indictment of physician for administering whisky to a person without a proper examination was defective because it did not state facts showing his bad faith in administering it.

Appeal from Monroe Circuit Court.

Opinion of the court by Judge Pryor.

The indictment is defective and the demurrer was properly sustained. Whether the physician made a proper examination of the patient, with the purpose of administering the whisky as a medicine in good faith, is not to be determined by the pleader. It will not always answer in a pleading to follow the language of the statute in framing an indictment, and this is of that class of cases. The examination of the patient may have been thorough on the part of the physician, and still, in the opinion of the pleader or of the grand jury, not a proper examination. The facts must be alleged showing a violation of the statute, unless the physician with the intent to avoid the statute and knowing the party was in no want of the stimulant, prescribed it for him, or gave him the whisky, without making any examination whatever for the purpose of ascertaining whether he was in need of the liquor given him. This statute should not be so construed as to interfere with professional duty, and before the physician can be subjected to a fine for its violation the facts showing his bad faith in administering the whisky must be alleged and proven. The judgment is affirmed.

P. W. Hardin for appellant.

W. H. Botts for appellee.

TURNER v. RANKIN.

(Filed March 30, 1882.)

1. Surety is discharged from liability by lapse of seven years after cause of action accrued or the maturity of his obligation.

2. When the claim against the surety could not be paid or collected without an order of court, although no cause of action could exist until such order was made, the surety is discharged in seven years after the maturity of the note.

The fact that the surety was an attorney in the action in which such a note was executed does not render him liable as such surety after the lapse of seven years after the maturity of the note.

Appeal from Henderson Common Pleas Court.

Opinion of the court by Judge Pryor.

On the 9th of September, in the year 1867, an order was made in an action pending in the Henderson Circuit Court, in the name of Jacob Rouse's Adm'rs v. Rouse's Heirs and Credi-

tors, by which Adam Rankin, as receiver, was ordered to loan out the sum of \$1,175.91, the amount of a certain fund that was claimed in said action to belong to W. S. Hicks, and not to the estate of Rouse. The order recites: "The parties appeared by their counsel, and on motion of the plaintiff it is ordered that Adam Rankin be appointed a receiver herein, and is directed to loan out the sum of \$1,175.91, on deposit in the Farmers Bank to the credit of J. S. Rouse, D. S., as mentioned in the petition, for the term of six months; that he take bond with good security," &c. The receiver loaned the money to L. W. Trafton and took from him his note for the money, with the appellant as surety, payable as follows:

"Six months after date we, L. W. Trafton, principal, and H. F. Turner, surety, promise to pay A. Rankin, as receiver in case of J. S. Rouse's administrator against his heirs and creditors, the sum of eleven hundred and seventy-five dollars and ninety-one cents, with interest from this date.

(Signed:) "L. W. TRAFTON,

"H. F. TURNER.

"Henderson, September 10, 1867."

The receiver reported his acts to the court, with the note taken from these parties, and, the litigation continuing for many years, no effort was made to collect this note until the 19th of December, 1877, when the attorneys for Hicks, who was claiming this fund, obtained an order of court directing the receiver, Rankin, to collect the money and reloan it. A period of near ten years had elapsed from the maturity of the note to the making of this order. Trafton, the principal, had died insolvent, and the surety, Turner, resisting payment, the receiver, by a subsequent order of court, was directed to institute this action. The principal defense relied on was the statute of limitations, and upon the hearing a judgment was rendered against the surety. The judgment below was rendered on the ground that no cause of action accrued to the parties in interest or to the receiver, until an order of court was entered directing the collection of the money; and the two cases reported in 3 Bush, of *Barbee v. Pitman* and *Rankin v. White*, are relied on as sustaining the action of the court below. In the case of *Barbee v. Pitman*, the bond was executed to the

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officer who had sold property under an attachment, payable in ninety days, for such uses as may hereafter be adjudged by the Adair Circuit Court; and in Rankin v. White, was where money deposited in court had been loaned out by an order of court for the benefit of conflicting creditors, as in this case. In the two cases it was urged that the surety was released by reason of the failure of the parties, or some one for them, to issue an execution within a year after the bonds became due; that these bonds had the force of a judgment, and upon which an execution should have issued. The bonds in neither of the cases cited were such as would enable the parties to have execution issued upon them without first obtaining an order of court, and then the proceeding would be by rule. The court might, it is true, have enforced either bond by rule or execution, after payment demanded by the receiver, or some one authorized to collect the money under an order of court. The receiver having loaned the money, in the case of Rankin v. White, had no power to collect it and the debtor no right to pay it to the receiver or the parties until ordered by the court, and when so ordered the refusal to pay by the debtor would have authorized the proceeding by rule or execution. It is, therefore, evident that such obligations do not fall within the statute requiring an execution to issue upon them within a year from maturity in order to hold the surety. In our opinion the cases referred to are not analogous to the one being considered, and that, when properly applying the statute of seven years for the protection of sureties, the appellant in this case was released from all liability. Sections 2 and 4, or either, of article 6, of chapter 71, General Statutes, relieves the surety from responsibility in a case like this. Section 2 provides that "a surety in any bond, given in the course of any judicial proceeding, shall be discharged from all liability thereon unless suit be brought thereon within seven years after the accrual of the causes of action." Section 4 provides that "a surety on any obligation or contract, other than those provided for in the last two preceding sections, shall be discharged from all liability thereon when seven years shall have elapsed without suit thereon after the cause of action accrued." The same limitation is found in the Revised Statutes, so it is immaterial

whether the obligation sued on is to be regarded as a note or bond taken in a judicial proceeding, the same limitation applies. It is insisted, however, that no cause of action accrued until an order of court was entered directing its payment, and the institution of an action to recover it.

It is conceded that the surety could not pay the money to the receiver or to the parties in interest without an order of court and that they had no right to collect it without such authority. Still the defense of the surety should have been maintained. The surety is bound alone by the terms of his covenant, and in this case the money was directed to be loaned out for the period of six months, the receiver being required to take the note of the principal with surety. When the surety signed the note he bound himself to the effect that his principal, at the expiration of six months, would pay this money, and was informed by the order of court itself that no longer time would be given. He stood then in no other light than as a mere surety liable for the default of his principal, and subject to be proceeded against under the rules regulating the collection of money under the practice of the chancery court.

But it is still insisted that no cause of action existed or the right of action never accrued, although the note had been due for ten years, because no one had been authorized to collect the money.

To whom is this want of diligence to be attributed, and who must be made to suffer, the parties who were alone interested in the litigation or the surety who had no interest whatever in the result of the controversy? He did not bind himself to the effect that his principal should have the money forthcoming subject to the order of the court, or that the money should be paid at the termination of the action, but stood on the letter of his bond liable for the default of his principal in failing to pay the money when the note matured.

This money belonged to the one party or the other engaged in conducting the litigation in the chancery court. On the motion of one of the parties, and without any objection by the other, the money is loaned out for six months; and, because the chancellor had assumed to control the fund, the parties in interest, who have been guilty of the laches, are to be protected

and the surety made to bear the loss. While the right to bring an action did not exist in either without the order of the chancellor or until final judgment, still either party, by motion made at any time after this note matured, could have compelled the payment of the money into court by the principal or his surety, or could have had the money relouaned.

They had asked the chancellor to make the loan, and had only asked him to have the money collected in order to protect them from loss by reason of the lapse of time or the embarrassed condition of the parties who owed this money. The remedy for the collection of the money was ample and complete, and while the rights of the parties to the fund had not been determined, they could at any term of the court during the ten years have had the money collected and their rights fully secured. The remedy for enforcing the collection of the claim existed with both or either of the parties, and we perceive no good reason why the rights of a surety should be disregarded and his defense denied because the two litigants were asking the chancellor to determine their respective claims to the fund. It was the money of the one or the other, and as it does not even now appear who is entitled to it, the laches in the case must result in loss to the real owner and not to this surety. It is pleaded that the surety was one of the attorneys in the case, and is for that reason bound. His client is making no complaint against him, nor is there any charge of bad faith or a breach of trust alleged by reason of his relations to his client, or to the court, and, therefore, we see nothing in this point.

The judgment should have been for the appellant. Judgment reversed and cause remanded for further proceedings consistent with this opinion.

H. F. Turner, R. H. Cunningham, L. W. Trafton, Wm. Lindsay and A. Duvall for appellant.

S. S. Sizemore and Vance & Vance for appellee.

HAWKINS, &c. v. BROWN.

(Filed March 30, 1882.)

1. In rescinding contract to sell land parties should be placed in statu quo as far as possible.
2. Rules in rescinding as to lasting improvements and rents.

Grantee of feme covert is not deprived of his right to lasting improvements, made by him under a mistake of law that she was capable of contracting, by his knowledge that she was a feme covert at the time he contracted with her.

"The rents should be regulated by the interest on the consideration and value of the lasting improvements, being neither greater nor less than their united amount."

Appeal from Warren Circuit Court.

Opinion of the court by Judge Hargis.

The appellee, a married woman, sold and conveyed a tract of land to the appellant.

She received and used the consideration which was about the value of the land at the time she conveyed it.

Her husband did not join in the deed.

The appellant occupied the land for fourteen years and erected lasting and valuable improvements on it, more valuable than the land itself.

Then the appellee brought this suit to set aside the conveyance she had made on the ground that she was a feme covert when and ever since she executed it, and sought to recover the land and the rents thereof.

The appellant resisted her prayer and asked that he be reimbursed the purchase money he had paid to her, with interest from the date of payment, and that he be adjudged the value of the lasting improvements, with interest thereon.

The court adjudged to her the land and canceled the deed, and referred the cause to the master to audit and report the rents and improvements.

The master reported in favor of appellant the consideration he had paid and six per cent. interest thereon, the taxes, and the enhanced vendible value of the land by reason of the improvements, but rejected his claim to interest on the two last-named items.

And he reported in her favor yearly rent to the amount of the united annual interest on the consideration and the prime cost of the improvements, which brought her in debt to the appellant in the sum of \$818.60.

Upon her exceptions the court set aside the commissioner's report, and rendered judgment in favor of appellant for \$232.60.

This result was reached by first stating the account thus:

IN BEHALF OF APPELLANT.

Consideration	\$750 00
Interest on same	588 00
Taxes paid on land	54 60
Improvements	1,200 00
Total	<u>\$2,592 60</u>

IN BEHALF OF APPELLEE.

Rent for 6 years, at \$60 per year	\$360 00
And 8 years, at \$250, per year	2,000 00
Total	<u>\$2,360 00</u>

Amount due Hawkins, appellant \$232 60

The sum allowed appellant for the improvements was their prime cost, and the rent was fixed in favor of appellee at the value estimated from the opinions on that subject of the witnesses.

From the judgment giving to her the land there is no appeal, and the only question, therefore, for our consideration involves the propriety of the criteria upon which the court based its judgment.

In all cases of rescission of contract the object of the chancellor should be to place the parties, as far as possible, in the condition they occupied before making the contract.

And the facts of each particular case must in some degree control the equitable adjustment of the rights of the parties.

In this case the appellant knew the appellee was a married woman when he contracted with her, and as a matter of law he is presumed to have known that she was incapable of contracting, but as a matter of fact he did not know she was so disabled by her coverture.

Shall he, as contended by appellee's counsel, be denied anything for his improvements because her disability was known to him? We think not.

This court held, in the case of *Bell's Heirs v. Barnett*, 2 J. J. M., 520, that after judicial notice to an occupant under purchase that the land does not belong to him, he should be allowed pay for his improvements made after such notice so far as they enhance the value of the land.

So in the case of *Thomas v. Thomas' Ex'or*, 16 B. Mon., 400,

it was held that the widow was in equity bound to account for improvements by which the vendible value of the land was increased, although when she signed the deed she was a feme covert and was incapable of imposing a charge upon her property or of disposing of it except in the mode and with the solemnities prescribed by law.

And in *Barlow v. Bell*, 1 Marsh., 246, the land of the wife was sold by the agent of her husband, and after the death of the latter she sued and recovered the land on the ground that she did not join in the sale or conveyance. The court refused the purchaser pay for his improvements because he was shown to have had a perfect knowledge of the feme covert's title and was advised of the consequences of a purchase from her husband's agent before he made it, yet it was said by the court that "we should have no hesitation in relieving the possessor for improvements made upon the land whilst he bona fide considered it his own. The possessor, by bestowing his money and labor in meliorating the land, advances its value and consequently the rightful owner, unless liable to the claim of compensation, is so much the gainer by the loss of the possessor, contrary to the maxim '*nemo debet locupletari aliena jactura*.'"

These principles apply to the facts of this case. It appears that the improvements were not in fact made mala fide, but under the mistaken belief that the wife had the right to sell her own land without the conjunction of her husband. And she, having actively and willingly participated in the transaction, there being no fraud or deceit practiced by the appellant, should be required to do equity and pay for the improvements, which she necessarily recovers with the land, to the extent that they enhance its vendible value.

And the rule as to the quantum of rents laid down in *Morton's Heirs v. Ridgeway, &c.*, 3 J. J. M., 258, is, in our opinion, applicable to this case. There it was said: "The rents should be regulated by the interest on the consideration and on the value of the improvements, being neither greater nor less than their united amount."

This was the criterion by which the master was governed in his report, which should have been confirmed.

Wherefore, the judgment is reversed, with directions to overrule appellee's exceptions to the master's report and render judgment in conformity thereto.

E. W. Hines and Rodes & Settle for appellants.

H. T. Clarke for appellee.

MONROE v. STEPHENS, &c.

(Filed March 21, 1882.)

1. Title to land vested absolutely in a mortgagee when he became the purchaser thereof for less than the amount of his debt at his foreclosure sale thereof under the old chancery practice in vogue in 1844, and, in such a case, no conveyance to him by commissioner was necessary.

2. Deeds incorrectly describing lands by mistake were properly admitted as evidence in the chain of title in this case.

The jury should have been instructed that if they believed from the evidence that there was a mistake in the deeds in describing the lands they should find for the plaintiffs who claimed under such deeds.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Hines.

This is an action in ejectment by appellees to recover three quarter sections of land, one of the quarter sections described as the northwest quarter of section 22, Townships 5, Range 1. E. Both appellant and appellees claim to hold title through N. W. Naylor, to whom the land was patented. Appellant claims to hold the land as tenant of Naylor, and appellees claim under a deed from Anderson & Kemble, who, it is claimed, derived title through J. C. Calhoun, and Peterson, Son & Co., from N. W. Naylor. Naylor mortgaged the land to Peterson, Son & Co., and in 1838 a suit was brought in the circuit court of the United States for Kentucky to foreclose the mortgage, and to sell the land in satisfaction of the debt. A decree of foreclosure was entered and time given until the next term of the court, and on failure of Naylor to redeem his equity of redemption was barred by decree, the land directed to be sold by commissioner, and at a sale made in conformity to the decree in 1844 Peterson, Son & Co. became the purchasers for a sum much less than their mortgage debt, which had been ascertained in the nisi decree. The report of sale was confirmed and a writ of possession ordered. No conveyance was made

and no order for conveyance until 1873, when Meriwether, as commissioner of the court, undertook to make a deed, under order of the court, to Peterson, Son & Co.

The first objection made by appellant to the ruling of the court is in the admission of the record and deed of Meriwether from the United States Court and upon the ground, first, that the time intervening between the final decree in 1844 and the making of the deed in 1873 operated as a bar to the enforcement of the decree in favor of Peterson, Son & Co.; and, second, that the deed does not conform to the decree. We need not consider the question of the admissibility in evidence of the deed of Meriwether because we are of the opinion that as Peterson, Son & Co., the mortgagees, were the purchasers under the decree of foreclosure the title to the land vested in them absolutely, and free from all conditions. The proceedings in the suit for foreclosure were in conformity to the practice in chancery then pursued in Kentucky (*Dowing, &c. v. Palmateer*, 1 Monroe, 66), and the legal title being in Peterson, Son & Co., by the execution of the mortgage, the right of redemption being barred by the final decree for sale, which was preceded by an order giving time to redeem, and the mortgagees being purchasers under that decree for a sum less than the mortgage debt, all conditions affecting the title were removed and it then vested absolutely in Peterson, Son & Co., and, therefore, no conveyance to them by commissioner was necessary. (*Fenwick's Adm'r v. Macey*, 2 B. M., 487; *Jones on Mortgages*, volume 2, section 1586; *Perine v. Dunn*, 4 Johnson's N. Y. Ch.)

The second objections are to the introduction in evidence of the deeds from Peterson, Son & Co. to Calhoun and from Calhoun to Anderson & Kemble. Those objections are based upon the fact that these deeds do not purport to convey any title to the northwest quarter of section 22, but to the northeast quarter of that section, and, notwithstanding the fact that the deed from Anderson & Kemble to appellees purports to convey the northwest quarter of section 22, there does not appear to have been any title in Anderson & Kemble, nor does the title appear to have ever passed out of Peterson, Son & Co., in whom it was

vested by the decree of the United States Circuit Court, unless it can be shown that there was a mistake in the deeds to Calhoun and to Anderson & Kemble, and that the land described in those deeds was intended to be the northwest instead of the northeast quarter of section 22. This mistake was probably made and it was, therefore, proper to allow these deeds to go to the jury as evidence in the chain of title.

But the court erred in taking from the jury the consideration of that question. The jury were in substance told that if they believed the evidence introduced they should find for appellees. This was error. The instruction given was in effect a peremptory instruction to find for appellees. The jury should have been told that if they believed from the evidence that there was a mistake in the deeds to Calhoun and to Anderson & Kemble in describing the land as the northeast quarter of section 22, when it should have been the northwest quarter of section 22, that they should find for the plaintiffs, appellees here.

Judgment reversed and cause remanded, with direction for further proceedings consistent with this opinion.

W. W. Tice for appellant.

W. M. Smith for appellee.

ANDERSON v. WEST.

(Filed March 25, 1882.)

1. Execution purchaser of land subject to existing liens has no claim against the surety in the replevin bond on which the execution issued for the loss he sustained by the failure of the land to sell for an amount sufficient to satisfy such liens, and also pay the amount bid by him.

2. Execution purchaser of land must take notice of liens mentioned in the levy and also of the lien for purchase money retained in the deed to the execution defendant filed for record in the clerk's office.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Pryor.

In May, 1872, an execution issued from the Graves Circuit Court in favor of T. I. Puryear, as sinking fund commissioner of Graves county, against John Eaker, R. K. Williams and others, for several thousand dollars. This execution was replevied by the defendants, with the appellant, Lucien Ander-

son, as their surety. Payments were made reducing the principal debt, and for the balance remaining unpaid an execution was issued on the replevin bond, and levied upon a tract of 160 acres of land, as the property of John Eaker, the principal obligor. The levy was made subject to a mortgage of \$500, executed to Samuel Storey upon a part of the land. The land was appraised at \$18 per acre and was sold by the sheriff for the sum of \$600, the appellee, West, being the purchaser. At the time of the sale there was a vendor's lien on part of the tract, in favor of one Yancy Eaker, for \$1,800, making the entire liens \$2,300. The parties holding the lien, by proper proceedings, subjected the property to the lien debts, and when sold, after satisfying the liens, there was only about \$200 of the purchase money left for the appellee, West, who was the purchaser under the original sale, and who acquired title subject to the liens then existing upon the land. West then filed his petition in equity, alleging the existence of the liens on the property at the time of the purchase; the sale of the land to satisfy these liens, and seeks to recover from Anderson, the appellant, who was surety on the replevin bond, the amount of his loss by reason of his purchase, alleging that he had no notice in fact of the existence of the lien for \$1,800, and, having paid the debt or contributed to pay it, for which Anderson was liable, the latter must make up to him the loss he had sustained. The chancellor below adjudged that in equity the appellant was liable, and required the surety in the replevin bond to pay to the appellee, West, the sum he had lost by reason of his purchase.

Anderson, the surety, alleges that at the time of the purchase by the appellee, West, the deed retaining a lien on the land was of record in the Graves county clerk's office, and that the appellee had constructive evidence of its existence. It appears that the deed had been lodged for record and that it retained a lien for the \$1,800. There is no allegation of any fraud or misrepresentations made by the appellant, or any of the original debtors, by which the appellee was induced to make the purchase, nor is there any question as to the title of the execution debtor to the property sold, except as to the incumbrances upon it. So it is manifest that the appellee acquired by his

purchase a lien on the land for the purchase money, with interest at ten per cent. per annum from the day of sale, subject to the prior incumbrances.

There is no pretense that there was nothing to sell or that the sheriff had sold property to which the execution debtor had no title. It may be regarded as settled that when property has been sold as the property of the debtor, and it turns out that the debtor had no title and the purchaser having paid the debt loses the property, he may sue the debtor and recover the amount paid for him, but whether this is that character of case, so far as the principal debtor is concerned, is not material to inquire, as he is not before this court and is making no question as to the right of recovery as against him by the appellee. It is the surety in the replevin bond who is complaining of the judgment, by which he has been compelled to refund the money paid by the purchaser, and we can not well see upon what rule of equity he is made to indemnify the purchaser. He offered no inducement to the appellee to make the purchase, and the latter acquired all the rights of a purchaser subject to the incumbrances. It was as much and more the duty of the appellee to investigate the condition of the title than that of the surety in the replevin bond. He was about to purchase this property for cash, subject to the mortgage lien of \$500, of which he had actual notice by the levy itself, and the conveyance retaining a lien for the \$1,800 had been lodged for record, of which he was required to take notice, certainly in so far as it affects the rights of this surety. He was getting a tract of land valued at \$2,900 for \$600, subject, as he supposed, to the lien of \$500 only, and when he finds a lien for \$1,800 more, permits the sale by which his speculation is ended, and then looks to one for indemnity whose claim upon the chancellor for protection is superior to his.

When fraud is practiced by the sheriff by selling that to which he knew no title existed in the debtor, he might or should be held liable, or where the plaintiff in the execution, by false representations, induced the purchase, he must be liable, but the sheriff, as decided by this court in the case of *Harrison v. Shanks*, 13 Bush, does not, by implication of law, warrant the

title to the property sold, nor can the plaintiff in the execution be held liable when he has done nothing more than pursue the legal remedy for his debt, and it is, therefore, incumbent on the purchaser to make inquiry as to the nature of the title before he makes the purchase, but in this case there is no doubt about the title, and the appellee made the purchase with his eyes open so far as this surety is concerned, and he is without remedy as against him.

But for the purchase made by the appellee the surety could have fully indemnified himself by discharging the liens for \$2,300 and obtaining land valued at or near \$2,900. The appellee had invested \$600 in this land subject to the liens upon it, and if he was actually ignorant of the existence of these liens it was the result of his own laches. The law gives him knowledge of the lien retained on the conveyance of record or filed for record in the county clerk's office, and that the land was not as valuable as he supposed, or the speculation terminated in loss, are results to be attributed to his own want of diligence, and for which he alone, so far as this surety is concerned, is responsible.

Eaker, at the time of the levy, had the legal title, it was subject to sale and the sale valid, and the appellee acquired a lien for his purchase money subordinate to other liens of which he was by law compelled to take notice, and, therefore, he has no equitable claim against this surety, nor do we adjudge, as the question is not before us, that if no title existed the appellee had a remedy against the surety on the replevin bond. The judgment is, therefore, reversed and cause remanded, with directions to dismiss the petition as against the appellant. (Covington & Cincinnati Bridge Co. v. Walker, 1 Duvall; Harrison v. Shanks, 13 Bush; N. Y. Eaker v. West, MS. opinion, part of this record.)

A. R. Boone, E. W. Hines and W. M. Smith for appellants.
W. W. Tice and Crossland & Crossland for appellee.

MOOAR, &c. v. COVINGTON CITY NATIONAL BANK.

(Filed March 25, 1882.)

1. Execution may be replevied for three months at any time before the sale of property under the same.

2. Computation of time—If from an act done, the day on which it was done must be included. If to be made after or from the day itself, that day must be excluded.

3. When an execution is replevied February 28th, an execution on the replevin bond may be issued on the 29th day of May.

But if the bond had been dated February 1st the execution would be due May 1st.

4. Motion to recover possession of land, by purchaser at execution sale in this case raised questions of law for the court, but no question of fact for a jury.

The motion presented a sufficient statement of facts in this case.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Pryor.

This was a motion under section 9 of article 12, chapter 38, General Statutes, to recover the possession by the purchaser of real property sold under an execution. On the hearing of the motion the appellant, Mooar, urged various objections to the motion. The execution, by virtue of which the sale was made, issued on a replevin bond. The condition of the bond is that "Mooar, the principal, and his sureties, bind themselves, three months after date, to pay the Covington City National Bank the sum of one hundred and sixty-seven dollars," etc., dated the 28th of February, 1878.

The execution issued on the 29th of May, 1878, and when placed in the hands of the officer the defendant in the execution surrendered the real estate sold for the purpose of satisfying the debt.

It was urged below, and is argued as a ground for reversal here, that the execution issued before the bond was due, and the sale is, therefore, void. This court, in the case of *Bettis v. Baily*, 2 Bush, adjudged that a sale under an execution issued at the instance of the plaintiff, upon a replevin bond before its maturity, conferred no authority on the sheriff to sell the property of the defendant, and the plaintiff, being the purchaser, acquired no title to the property purchased.

The General Statutes provide that a month should be construed to mean a calendar month. (Section 7, chapter 21.) The

condition of the bond is that three months after the date hereof the defendant will pay, etc. It is insisted that under such a bond the computation of time is not from the act of signing, but is from the day following its execution; that is, as the money is to be paid three months after the 28th of February, that day is necessarily included. The rule is well settled that where the computation is to be made from the act done, then the day in which it is done must be included, but if to be made after or from the day itself, the day must be excluded (*Stockton v. Johnson*, 6 B. M.; *Childs v. Smith*, 13 B. M.; *Mute v. Carleton*, 1 Bush; *Hundley v. Cunningham*, 12 Bush). Section 2 of article 8, General Statutes, provides that "any execution on a judgment which could be replevied before such execution issued may be replevied for three months at any time before the sale of the property under the same," etc.

The form of the bond is also found in the same section, and the entire section must be considered in determining the legal effect of the bond, by which the plaintiff in the execution is prevented from proceeding to levy or sell under it. The defendant has the right to replevy the judgment for three months, and when the replevin bond is executed and delivered to the sheriff the virtue of the execution is gone and that writ must be returned. So on the 28th of February, the day on which the bond in this case was executed (the act done), the plaintiff could no longer proceed with his execution, and from that time to the 28th of May following, and including the latter day, the replevy continued, but on the 29th of May, the three months having expired, the execution on the bond became due and was properly issued. If the construction contended for by the appellant is adopted the plaintiff would not be entitled to his execution until the 1st day of June; that is, including the 28th of February, the time would begin to run from the 1st of March and end on the 31st of May. The computation of time should begin with the execution of the bond and end in ninety days unless the bond is dated on the first day of the month. The ninety days in this case, including the 28th of February, the day the bond was executed, would expire on the 28th of May, and on the 29th the execution was due, and the execution having issued on that day the levy and sale under it was proper.

If the bond had been dated on the 1st of February, then the months of February, March and April would include the time during which no execution could issue, and the execution on such a bond must be due on the 1st of May.

By section 9 of article 12, chapter 38, General Statutes, it is provided in substance that the purchaser of lands sold under execution shall have the right, after obtaining a conveyance therefor, upon ten days' notice in writing to the defendant, where land has been sold, to a judgment for possession, if upon the hearing the court shall be of the opinion that he is entitled to the possession, etc. The proceedings on said motion shall be the same as under chapter 6, title 10 of the Civil Code of Practice. The appellant insists that he was entitled to a jury to try the question of appellee's right to the possession. This was intended to be a summary proceeding. The plaintiff having obtained his judgment and levied his execution on the land of the appellee, all of which is not controverted, we see no reason why possession should not be delivered, as the questions as to the right of possession and the regularity of the proceeding are purely questions of law.

An objection is also raised as to the sufficiency of the notice upon which the motion for possession was based. In the petition is set forth a complete and definite statement of the steps taken in order to obtain the execution. The court in which the action was brought; that it had jurisdiction; the parties defendants to the action and the rendition of the judgment; the creditors levy and sale under it; the property sold and its description and the conveyance from the sheriff. All these facts are specifically alleged, and, if true, entitled the appellee to his writ of possession. It was not necessary to allege in so many words that the defendant was the owner of the property, or to follow the form in an action of ejectment or in an action for the recovery of real property. The facts stated show that the appellee is the owner as against the defendants to the motion, and that it is entitled to the possession. It is also argued that the motion should have been dismissed because the notice says the execution was against C. H. Mooar, Scott and others, and the motion for the possession is against Mooar, Alex. Brown and Pearson.

The notice was served on Brown and Pearson for the reason, as stated in the notice, that they were the tenants of Mooar and in possession of a part of the property purchased. These parties appeared, or were at least notified, and made no defense whatever, except as to the form of the proceeding and the insufficiency of the notice. Really upon the face of the record it does not appear, except by the statement in the notice, that Brown and Pearson have any interest in this controversy. They have asserted no interest whatever or any right to the property or the possession as against the appellee, and, therefore, the judgment should be affirmed.

R. D. Handy for appellants.

Benton & Benton for appellee.

HELM v. COFFEY.

(Filed March 28, 1882.)

1. Motion and grounds for a new trial in a common law action, when the law and facts are submitted to the court without a jury, are necessary in order to a review by Court of Appeals of any alleged error committed by the court below during the progress of the trial.

2. In the absence of a motion and grounds for a new trial nothing is brought to the Court of Appeals for review except the inquiry as to whether the pleadings state any cause of action or any defense, and whether the evidence heard and properly presented by bill authorize the judgment.

Every other error is waived by failure to call the attention of the court below to it by motion and specific grounds assigned.

Appeal from Daviess Circuit Court.

Judge Hines delivered the following response to a petition for rehearing.

The principal question to be considered is whether a motion and grounds for a new trial are necessary, in a common law action, when the law and facts are submitted to the court without a jury.

We are of opinion that such motion and grounds for new trial are necessary in order to a review by this court of any alleged error committed by the court below during the progress of the trial. In the absence of a motion and grounds for a new

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trial nothing is brought to this court for review on appeal except the inquiry as to whether the pleadings state any cause of action or any defense, and whether the evidence heard, and properly presented by bill, authorize the judgment. Every other error is waived by the failure to call the attention of the court below to it by motion and specific grounds assigned. This requirement seems to us as important when there is no jury as when there is a jury, for, ordinarily, questions of law are for the court and questions of fact for the jury, and a failure to call for a jury operates simply to make the court the judge of the facts as well as of the law, but does not in any way alter the practice as to the manner in which any alleged error of the law committed by the court may be taken advantage of (*Harper v. Harper*, 10 Bush, 451). And in either case the error complained of should be specifically called to the attention of the court below, in order to afford an opportunity for correction, as is required by assignments of errors in this court.

The case of *Union Insurance Co. v. Groom*, 4 Bush, decides nothing more than that when the law and facts are submitted to the court below this court may, without motion and grounds for new trial, pass upon the question of the sufficiency of the evidence to sustain the judgment. The reasoning of the court in that case bears as authority only on the question presented by the record for adjudication.

As the grounds for a new trial in this case, when the law and the facts were submitted to the court, are too general to authorize an inquiry into the assignment of errors, and as the pleadings present a cause of action and a defense, we will consider only whether the facts justify the judgment. Waiving the consideration of any other question in the case, it is clear that an issue was found upon the inquiry as to whether there was a ratification by appellant of the alteration in the note sued on. Upon this issue the evidence is conflicting and it may be conceded that the weight of the evidence is adverse to the conclusion that there was a ratification, but as it is not so obviously and flagrantly opposed to the conclusion reached by the court below as to strike the mind at first blush as radically wrong, we can not disturb the judgment.

Judgment affirmed.

Geo. W. Jolly for appellant.

Owen & Ellis for appellee.

COTTON v. BROWN.

(Filed March 25, 1882—Not to be reported.)

1. Deed by husband to his wife vests the beneficial use in the wife as her separate estate, and in equity the husband is her trustee.
2. Equity never allows an estate to fail for want of a trustee.
3. Action to set aside a conveyance, because constructively or actually fraudulent, must be brought within five years after such conveyance was recorded.

Section 2, article 1, chapter 44, and section 2, article 3, chapter 71, General Statutes, apply in such cases.

Appeal from Nelson Circuit Court.

Opinion of the court by Chief Justice Lewis.

But two questions necessary to be considered arise in this case.

First. Whether the deed made by Abe Brown to Dilsey Brown on the 3d of January, 1871, and duly recorded in the proper office, is effectual for any purpose.

Second. Whether that conveyance, being without valuable consideration, and, therefore, under section 2, article 1, chapter 44, General Statutes, void as to all the then existing creditors of Abe Brown, the statute of five years' limitation provided in the cases mentioned in section 2, article 3, chapter 71, applies to this case.

It is contended by counsel for appellant that the property being conveyed or attempted to be conveyed by a husband in trust for his life no title passed, because no grantee or trustee is mentioned in the deed.

Although contracts between husband and wife are, by the rules of common law, void, it is not so in equity; and it is a rule that admits of no exception that equity never wants a trustee, so that whenever a trust exists either by the declaration of the party or by intendment or implication of law, and the party creating the trust has not appointed any trustee to execute it, equity will follow the legal estate, and decree the person in whom it is vested to execute the trust (Story's Equity, section 976; Perry on Trusts, section 38). And if a

sale or gift be by the husband directly to the wife the legal title will remain in him, and the beneficial use will vest in her as her separate estate, and the husband will be treated as her trustee. (Campbell v. Galbreath, 12 Bush, 464.)

The deed in this case operated to vest in Dilsey Brown the beneficial use of the property as her separate estate, and to make her husband, Abe Brown, her trustee, and upon her death appellee, Juliet Brown, being her only child and heir at law, inherited the same estate in the property.

Although conveyances by a debtor without consideration therefor are, by the terms of section 2, article 1, chapter 44, General Statutes, declared not fraudulent, but void as to his then existing liabilities, still we are of the opinion they are, in the meaning of the statute, constructively fraudulent, and that the statutory bar of five years provided in section 2, article 3, chapter 71, to an action for relief on the ground of fraud, was intended by the legislature to apply to such cases, as well as those of actual fraud.

And as the deed from Abe to Dilsey Brown, under which appellee claims, was recorded more than five years before the institution by appellant of his action to subject the property, it follows that the plea of limitation should avail appellee.

Wherefore, Judge Hines dissenting, the judgment is affirmed.

C. T. Atkinson for appellant.

Muir & Wickliffe for appellee.

McKEE, &c. v. SCOBEE, &c.

(Filed February 23, 1882.)

1. Assignment by debtor in contemplation of insolvency, with the design of preferring one or more creditors to the exclusion, in whole or in part, of others, will operate as an assignment and transfer of all the property and effects of such debtor, and enure to the benefit of all his creditors in proportion to the amount of their respective demands, including those which are future and contingent.

Both the contemplated insolvency and sale to or for the benefit of one creditor, to the exclusion of others, must concur before the trust can result from the operation of the statute.

Whether he knew at the time of the sale he was insolvent must be determined by the facts and circumstances as they are presented.

2. Surety of insolvent debtor is entitled to the benefit of the assignment of his principal, in common with ordinary creditors, whether he has paid the debt for which he is bound surety or not.

Appeal from Shelby Circuit Court.

Opinion of the court by Chief Justice Lewis.

On the 29th of January, 1879, Levi McKee sold and conveyed to his brother, Joshua McKee, 25 acres of land for the consideration of \$1,500 in payment of a pre-existing debt for that amount.

On the 28th of February, 1879, he made an assignment for the benefit of his creditors, conveying all of his property, not exempt from execution, to Virgil Lewis, his assignee. At the same time Joshua McKee reconveyed the 25 acres to the assignee for the payment of the creditors generally of Levi, he consenting thereto.

It appears that in 1872 Levi McKee became the guardian of E. T. and Fannie Farmer, and executed a guardian bond with appellee, Sam'l Scobee, as his surety, and at the date of the sale of the land was indebted to his wards about \$3,400.

This action was brought within six months from the 29th of January, 1879, by Scobee and appellee, P. S. Whitesides, to whom Scobee had previously conveyed all his property for the benefit of his creditors.

In their petition they allege that, besides the twenty-five acres, Levi McKee had, previous to the assignment by him to Lewis, sold a considerable amount of personal property and applied the proceeds to the payment of pre-existing debts. And that all of said sales and payments were made by him in contemplation of insolvency, and with the design of preferring the creditors to whom the payments were made to the exclusion, in whole or in part, of his other creditors.

Philip Bird, who had about the 25th of February, 1879, been appointed guardian of the two infants in the place of Levi McKee, was made a party defendant to the action.

Upon the trial of the action it was adjudged by the court below that the sale of the twenty-five acres of land was an act done in contemplation of insolvency, and with a design to prefer Joshua McKee to the exclusion, in whole or in part, of the

other creditors of Levi, and that the deed operated as an assignment of all his property for the benefit of his creditors.

From that judgment Levi and Joshua McKee, Virgil Lewis, assignee of Levi McKee, and Fannie Basket have appealed.

Appellants assign as errors:

First. The judgment of the court overruling the demurrer to the petition.

Second. The judgment of the court that the sale on the 29th of January was made in contemplation of insolvency, and with the design to perfer Joshua McKee, to the exclusion in part of the other creditors of Levi McKee.

The ground of demurrer is that the petition does not state facts sufficient to constitute a cause of action.

Counsel for appellants contend that the demurrer ought to have been sustained because, although Scobee was the surety of Levi McKee, he was not a creditor in the meaning of article 2, chapter 44, General Statutes, and could not maintain the action without alleging he had paid the debt for which he was liable as such surety. And that Whitesides, his assignee, has no right to maintain the action because Scobee, not being himself a creditor, could not, by his deed of assignment, make a creditor of his assignee.

It is clear that if Scobee, previous to his assignment, could have maintained the action, his assignee can now do so.

By section 1 of the article referred to it is provided that every sale, mortgage or assignment, made by a debtor in contemplation of insolvency and with the design to prefer one or more creditors, to the exclusion in whole or in part of others, shall operate as an assignment and transfer of all the property and effects of such debtor, and shall enure to the benefit of all his creditors in proportion to the amount of their respective demands, including those which are future and contingent.

So far from sureties being excluded from the benefit and protection of the law, it is clear that it was intended they should be included, even when they have not paid off the debts for which they may be bound. No other interpretation can properly be given to the language used. Besides, by section 2, same article, it is expressly provided that any person interested may file his petition to subject to the control of a court of equity

all such transfers as are in section 1 declared to enure to the benefit of creditors generally.

We are unable to conceive a state of case in which the surety of the failing debtor would not be "a person interested" in the meaning of the statute. For whether the assignment and transfer of the property and effects of the principal is by operation of law, or by his own act, the probable result is to impose the burden of discharging the debt wholly or partially upon the surety, and thus make what was before contingent a certain and fixed liability against him.

We are, therefore, of the opinion that the action was properly brought.

Both the contemplated insolvency and sale to or for the benefit of one creditor to the exclusion of others must concur before the trust for creditors can result from the operation of the statute. (2 Duvall, 277). But if the facts are such as to show that at the time of making the sale Levi McKee knew he was insolvent it will be within the statute. (4 Met., 23.)

It now appears that at the date of the sale to his brother, Levi McKee was unable to pay all his debts, and the necessary result of that sale was, therefore, to give Joshua McKee a preference to the exclusion, in whole or in part, of his other creditors. Whether he knew at the time of the sale he was insolvent must be determined by the facts and circumstances as they are presented.

About one month after the sale to his brother the deed of assignment to Whitesides was made, which amounts to an admission of his insolvency.

He appears to be a man of intelligence and was engaged extensively in the business of farming. But there is nothing to show that his business affairs were so complicated or diversified as to make it difficult for him to readily ascertain, before making the sale, whether he was solvent or insolvent.

Although there is nothing in the record to show that he lacks integrity, still, under the circumstances of this case, the only rational conclusion that can be reached is that he must have known he was insolvent; and if he did know, he must, according to a plain rule of law, be taken to have designed what was

the necessary result of that sale, viz., preference of his brother to the exclusion, in whole or in part, of his other creditors.

As to the effect of the conveyance by Joshua McKee to Whitesides, which was doubtless made in good faith, and with the intention to place all the creditors of Levi upon an equal footing, there is some difficulty arising from the fact suggested by counsel, that to set aside that conveyance would result in giving preference to the wards of Levi, and thus prevent an equal distribution of the assets amongst all the creditors.

But the statute being plain, direct and without any qualification, must be enforced as it is written.

As soon as the act of insolvency was committed all the property and effects of Levi McKee were, by operation of law, assigned and transferred for the benefit of all his creditors, and became subject to the control of a court of equity upon the petition of any person interested. And as neither the law or public policy authorizes or requires the status thus fixed by the parties themselves to be disturbed, the deed from Joshua to Whitesides must be held ineffectual to pass any title.

The judgment of the court below must be affirmed.

Bullock & Beckham for appellants.

Caldwell & Harwood for appellees.

ABSTRACTS OF DECISIONS NOT TO BE REPORTED.

KLUMP v. LIEBOLD.

Filed January 19, 1852.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Lewis, affirming.

1. By standing by and permitting the owner of an adjacent lot to erect a column over the dividing line between the two lots the appellant, in this case, is held to have consented to the erection of the column.

2. By a mistake in their deeds appellant gets nine and a half inches more and the appellee the same quantity less of the lot than they respectively purchased and believed they were getting.

FERGUSON v. SIMS.

Filed February 4, 1882.

Appeal from Caldwell Circuit Court.

Opinion of the court by Judge Hargis, affirming.

1. Each partner is the agent of the other in transacting the business of the partnership, and their acts in the regular course of business and within the scope of the partnership are binding on each other.

J. R. Hewlett for appellant.

COMMONWEALTH v. DOUGLASS.

Filed February 28, 1882.

Appeal from Fulton Circuit Court.

Opinion of the court by Judge Hargis, affirming.

1. Attestation of transcript by city judge after sixty days from the rendition of the judgment, in an appeal from the city court to the circuit court, was properly allowed in this case.

"The appeal from the city court was taken, and the transcript of the judgment, costs and a copy of the warrant were filed in the circuit court within sixty days, and, as held by this court in another appeal between these same parties, it was right to allow the city judge to attest the transcript, there being no other substantial defect in it."

2. Offense of keeping a disorderly house was not within the jurisdiction of the city court of Hickman because that offense "was not a violation of any ordinance or by-law of the city, and the punishment of the offense exceeded one hundred dollars had the court seen proper and possessed jurisdiction to inflict it.

C. H. Wilson and P. W. Hardin for appellant.

S. H. Crossland for appellee.

COMMONWEALTH v. BURLINGTON & BELLEVIEW T. P. R. CO.

Filed March 2, 1882.

Appeal from Boone Circuit Court.

Opinion of the court by Chief Justice Lewis, affirming.

1. Erecting fence across public highway.

"The instruction given authorized the jury to find the defendant guilty in case they believed from the evidence the defendant erected in or across the road a fence of any character whatever, and to fix the fine at one dollar for every twenty-four hours the same may have remained."

Instruction held to be correct. (See section 41, chapter 94, General Statutes.)

P. W. Hardin for appellant.

W. Montfort for appellee.

ROSS v. DIMMIT, &c.

Filed March 2, 1882.

Appeal from Bracken Circuit Court.

Opinion of the court by Judge Pryor, affirming.

1. Intention of ancestor will not control as to what shall be deemed advancements.

Gifts of small value made by ancestor are not considered as advancements.

2. Heir to whom land was ineffectually advanced is entitled to the value of the improvements made by him in the enhanced value of the land.

3. Slight error in commissioner's report, not objected to in court below, will not authorize a reversal.

W. H. Wadsworth for appellant.

DOUGLAS, &c. v. SHANNON, &c.

Filed March 4, 1882.

Appeal from Boyle Criminal Court.

Opinion of the court by Judge Pryor, affirming.

1. The judgment of the court is sustained by the evidence in this case.
Fox & Fox for appellants.
VanWinkle & Rodes for appellees.

COMMONWEALTH v. STEGALA (Nos. 2, 3, 4, 5 and 8).

Filed March 4, 1882.

Appeal from Fulton Circuit Court.

Opinion of the court by Chief Justice Lewis, dismissing appeal.

1. Appeal can not be taken before an order is made or judgment rendered in the court below.

The attorney for the Commonwealth moved the court for a forfeiture of bail bonds, and introduced the clerk of the court to identify the bonds. The court refused to receive his testimony, but made no order whatever in respect to the motion to forfeit the bonds. The court say: "We are of the opinion that it was never contemplated by the legislature that cases should be brought to this court by the Commonwealth upon the rulings of the court below upon the competency of testimony before an order or judgment is rendered in the proceeding where the testimony is sought to be used."

P. W. Hardin for appellant.

Wm. Lindsay for appellee.

COMMONWEALTH v. STEGALA (Nos. 6, 7, 10 and 11).

Filed March 4, 1882.

Appeal from Fulton Circuit Court.

Opinion of the court by Chief Justice Lewis, reversing.

1. Bail bond was not defective because of the omission of the name of the circuit court in which the defendant was required to appear and answer the indictment in this case.

P. W. Hardin for appellant.

Wm. Lindsay for appellee.

MULLINS v. COMMONWEALTH.

Filed March 4, 1882.

Appeal from Lincoln Circuit Court.

Opinion of the court by Judge Hargis, reversing.

1. Where evidence is introduced to show confession the accused has a right to have the whole of what was said in the conversation laid before the jury.

In this case evidence was introduced to show that the accused confessed that the pistol with which the shooting was done was his pistol, but the court below refused to allow the rest of the conversation to be admitted unless it touched the ownership of the pistol, whereas the whole conversation without such restriction should have been laid before the jury.

2. Evidence that a person indicted for the same offense had fled the country was improperly admitted in this case in which conspiracy was not charged.

3. Jury completed from bystanders—

"Although appellant and the other defendants were colored men, we perceive no error in the order to the officer to complete the jury from bystand-

ers after the regular panel was exhausted, whether persons of the African race composed any of the body of bystanders or not.

W. O. Bradley and S. M. Burdett for appellant.

P. W. Hardin, Attorney General, for appellee.

MAYO v. FERGUSON, &c.

Filed March 4, 1882.

Appeal from Floyd Circuit Court.

Opinion of the court by Judge Pryor, reversing.

1. The giving of reasonable sum by insolvent husband to his wife for the support of the family was not a fraud upon his creditors and does not render the wife's estate subject to the payment of his debts.

2. Because the wife is authorized by a court of equity to trade, etc., as a feme sole does not release the husband from his obligation to support her.

Wm. Lindsay for appellant.

W. H. Holt and R. H. Weddington for appellees.

MAYES v. HARTFORD FIRE INS. CO.

Filed March 7, 1882.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Pryor, affirming.

1. False representations by the assured invalidated an insurance policy in this case, notwithstanding the agent of the insurance company knew the representations to be false.

W. W. Tice for appellant.

W. M. Smith for appellee.

COMMONWEALTH v. STEGALA.

Filed March 7, 1882.

Appeal from Fulton Circuit Court.

Opinion of the court by Chief Justice Lewis, reversing.

1. Demurrer to indictment for selling malt liquors was improperly sustained in this case, "as by a special statute the selling of malt liquors is expressly prohibited within the limits of Fulton county, and no license to sell therein can be granted."

P. W. Hardin, Attorney General, for appellant.

Wm. Lindsay for appellee.

BROSEKE v. CARTON, &c.

Filed March 9, 1882.

Appeal from Pendleton Chancery Court.

Opinion of the court by Chief Justice Lewis, dismissing appeal.

1. Appeal can not be taken after two years from the date of the judgment.

2. Order repeating original judgment can not render an appeal proper after two years from the rendition of the first judgment.

Duncan & Barker for appellant.

UNDERWOOD, &c. v. UNDERWOOD, &c.

Filed March 9, 1882.

Appeal from Lewis Circuit Court.

Opinion of the court by Judge Hargis, affirming.

The children of customary marriages of negroes are legitimate whether born before or after manumission.

J. R. Garland and Roe & Roe for appellants.

Wm. Lindsay for appellees.

PADUCAH & ELIZABETHTOWN R. R. CO. v. COMMONWEALTH,
NO. 29.

Filed March 9, 1882.

Appeal from Grayson Criminal Court.

Opinion of the court by Judge Hargis, affirming.

1. The opinion in the case of the Paducah & Elizabethtown R. R. Co. v. Commonwealth, No. 30, is applicable to this case, excepting that portion of it in relation to the decision of the verdict by lot. (See ante, page 659.)

P. H. Darby and H. C. Pindell for appellant.

P. W. Hardin for appellee.

JOYES v. LAWRENCE.

Filed March 9, 1882.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor, affirming.

1. Devise to a trustee for the use of Mrs. Mary T. Riddle for life, with remainder to her children or grandchildren, if any survives her, vested an estate in fee in her child which, at the death of such child, descended to the child of the latter, and—

The child of the latter took the estate by descent, subject to such incumbrances and liens as were placed upon it by its parent. (Sale v. Crutchfield, 8 Bush; Hart v. Thompson's Heirs, 3 B. M., and Morris v. Shannon, 13 Bush.)

James P. Beattie and Boyd Winchester for appellee.

MILLER'S EX'OR v. WILSON, &c.

Filed March 9, 1882.

Appeal from Adair Circuit Court.

Opinion of the court by Chief Justice Lewis, reversing.

1. Prayer for judgment for blank dollars in counterclaim can not be objected to for first time in Court of Appeals in this case.

2. Usury may be included in a new note signed by the same parties in part, and when paid may be recovered back again.

3. If usury in old is carried into a new note so as to constitute any part of the sum agreed to be paid by it the usury in the new note should be extracted on proper plea.

4. Action to recover usury should be commenced in one year after the cause of action accrued.

The statute of limitations is not available in such an action unless it is pleaded and relied upon.

5. Credit upon note in the hands of the maker, its genuineness being denied, was improperly allowed to be read as evidence before the jury in this case, and for this error the judgment appealed from is reversed.

Alexander, Baker & Reid for appellant.

Rhorer & Jones and Wm. Lindsay for appellees.

EGINTON, &c. v. RUSK, &c.

Filed March 9, 1882.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Pryor, affirming.

1. Attorney has no lien upon land for services in defending grantee in suit brought by grantor to rescind the sale; he has a lien in case of the successful prosecution of an action for the recovery of land.

"When a conveyance has been made and the contract of sale fully executed an action by the grantor, if defeated, can not be said to amount to a recovery of the land by the grantee."

2. Recovery upon a note which, together with the land, was the consideration for the sale of a steamboat, is not a recovery of the land, and does not entitle the attorneys to a lien thereon.

W. P. D. Bush and Chas. Eginton for appellants.

Horace Cambron for appellees.

CRAWFORD v. STAGNER.

Filed March 11, 1882.

Appeal from Madison Common Pleas Court.

Opinion of the court by Chief Justice Lewis, affirming.

1. Alleged title holders must be made parties.

The only defense in an action on a note in this case was that the title of the vendor to the land, for which it was given, was defective. But as the defendant has failed to bring before the court those in whom he alleges the title resides, judgment was properly rendered against him.

W. B. Smith for appellant.

W. O. Miller for appellee.

BOYD v. WILSON, &c.

Filed March 14, 1882.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Pryor, affirming.

1. All the parties claim title to the land in dispute under the same deed, and in the same manner.

2. The Court of Appeals will not presume that an attorney has filed an answer without authority.

L. Anderson for appellant.

W. M. Smith for appellees.

HACKWORTH v. THOMPSON (2 Cases.)

Filed March 14, 1882.

Appeal from Lewis Circuit Court.

Opinion of the court by Judge Pryor, dismissing appeal without prejudice.

1. Judgment to sell land was reversed in this case.

This is the second appeal in this case. "This court affirmed the judgment (of the court below) in an opinion heretofore delivered upon a mere fragment of the record, and now the appellant offers to file an additional record that throws additional light upon the question involved. Why the appellant

is appealing from a judgment of sale, when that judgment is reversed, we can not see. All he has to do is to move for a restoration of the possession, first having set the sale aside. The judgment of sale was reversed, and at the May term, 1876, the opinion of this court was filed in the court below. What is to prevent that court from setting the judgment of sale aside?

On a rehearing this appeal is dismissed without prejudice and the former opinion withdrawn."

W. H. Cord for appellant.

A. Duvall for appellee.

BOREN v. DORRIS.

Filed March 16, 1883.

Appeal from Allen Circuit Court.

Opinion of the court by Judge Hines, affirming.

1. Question of fact in this case.

R. Rhodes for appellant.

FRAZER v. HOSKINS.

Filed March 16, 1882.

Appeal from Jefferson Common Pleas Court.

Opinion of the court by Judge Pryor, affirming.

1. Question of fact in this case.

Alexander, Baker & Read and I. & J. Caldwell for appellant.

Harlan & Wilson for appellee.

GRESHAM v. GRESHAM, &c.

Filed March 16, 1882.

Appeal from Rockcastle Circuit Court.

Opinion of the court by Judge Hargis, affirming.

1. Application for revivor of action against a personal representative must be made within one year and six months after his qualification.

2. Adverse possession of land for thirty years bars action for its recovery.

R. M. & W. O. Bradley for appellant.

Wm. Lindsay, Welch & Saufley and S. M. Burdett for appellees.

CISSELL v. RAPIER.

Filed March 21, 1882.

Appeal from Nelson Circuit Court.

Opinion of the court by Chief Justice Lewis, reversing.

1. Vendor is estopped to deny recitals of deed—

In this case appellee Rapier joined with his brothers and sisters in conveying a tract of land devised to them by their father to P. S. Barbour, who afterwards conveyed it to appellant Cissell. Subsequently appellee, Rapier obtained a patent from the Commonwealth to a portion of this land, and brought suit against Cissell for trespass.

Held—That appellee Rapier is bound by and estopped to deny the recitals of the deed, and that the estoppel runs with the land.

Held, also—That it is immaterial how Barbour or his grantors may have understood or intended the boundary to be, or whether at the time Barbour

purchased a survey and plat of the land, excluding the portion for which the patent was issued, was made and shown to him and adopted by him or not; for appellant Cissell, the vendee of Barbour, had a right to look to the recitals of the deed, and could not be concluded by Barbour's acts.

2. "Visible or actual boundaries, whether artificial or natural, are to be taken as the abutments of a survey so long as they can be found and proved, and it is only in case the description is ambiguous or doubtful that parol evidence of the practical construction given by the parties by acts of occupancy, recognition of monuments or boundaries or otherwise is admissible in aid of the interpretation."

3. The boundary of land is exclusively a question of law when the recitals of the deed are unambiguous and the objects called for certain.

N. W. Halstead and E. E. McKay for appellant.

Wm. Johnson for appellee.

PARKS v. KENTUCKY CENTRAL R. R. CO.

Filed March 21, 1882.

Appeal from Nicholas Circuit Court.

Opinion of the court by Judge Pryor, affirming.

1. Where a person boards a train the railroad employes have a right to presume that such person is a passenger intending to go to some other point on the road.

The appellant boarded the train, not as a passenger, but merely to see a friend and the train having begun to move off, she sprang from it and received injuries for which she claims damages from the railroad.

Held--That the railroad employes had a right to presume her to be a passenger, and also that when the train began to move off she should have told the conductor of the circumstances, instead of jumping from the train while in motion.

"Her injury being the result of her own imprudence no recovery can be had."

Ross & Kennedy for appellant.

Stevenson, O'Hara & Bryan for appellee.

TILDEN v. SPECHT.

Filed March 23, 1882.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor, affirming.

1. The judgment of the chancellor in an ordinary action tried by him without objection will be considered in the same manner as the verdict of a properly instructed jury.

Hamilton Pope for appellant.

WOODFORD & HATHAWAY v. PERKINS, &c.

Filed March 23, 1882.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Pryor, affirming.

1. Sureties on official bond of sheriff are not liable for sheriff's acts in selling goods held by him under an attachment by consent of the owner and without an order of the court.

"The appellants in this case, who were the attaching creditors, entered into an agreement with the debtor, whose goods had been levied upon by the sheriff, that he, the sheriff, should proceed to sell the goods, without an

order of the court, upon a credit of three months, and should hold the money or the proceeds of sale subject to the order of the court."

Held—That the sureties on the official bond of the sheriff were not liable for his failure to collect the money from the purchasers, etc.

Sweeney & Son for appellant.

R. W. Slack for appellees.

URTON v. DOWNEY.

Filed March 13, 1882.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor, dismissing appeal.

1. On order refusing to punish for contempt no appeal can be prosecuted. Appeal dismissed.

Harrison & McGrain for appellant.

T. B. Farleigh for appellee.

COX'S ADM'R v. MUDD, SHERIFF, &c.

Filed March 23, 1882.

Appeal from Green Circuit Court.

Opinion of the court by Chief Justice Lewis, reversing.

1. "It must be presumed that the county court performed the duty required by law by imposing a sufficient levy to pay all the claims allowed at its regular term held for that purpose, and that the sheriff did or might have collected in the time required by law a sum sufficient to pay plaintiff's claim."

2. County creditor should not be compelled to show that the sheriff had in his hands a sum sufficient to pay his claim after the time has expired within which he is required to collect the county levy and pay the claim.

R. S. Montague and D. A. Cardwell for appellant.

ELLIOTT, &c. v. LEE, &c.

Filed March 28, 1882.

Appeal from Owen Circuit Court.

Opinion of the court by Chief Justice Lewis, reversing.

1. Will rejected because propounders have no interest in it, parties interested having established another will.

"As the record stands the only person who has any interest as devisee in the will made in 1875 is Robt. H. Elliott, and he and his children appeared in the county court to propound the will made in 1873, appeared in the circuit court and appear here as appellants to have the will of 1873 probated and the one made in 1875 rejected. As it is not shown that the propounders of the will of 1875 have any interest whatever, and Robt. H. Elliott, the only devisee of that will, insists upon the affirmance of the order of the county court respecting it and probating the one made in 1873, we are of the opinion that the court below erred in reversing the judgment of the county court."

Thos. D. Theobald, J. D. Lillard and Jas. A. Duncan for appellants.

Geo. C. Drane for appellees.

BANK OF COLUMBIA v. BUSH.

Filed March 28, 1882.

Appeal from Jefferson Common Pleas Court.

Opinion of the court by Judge Hines, affirming.

1. Where a promise to pay its inferentially averred and no motion to make more specific it would be sufficient to support a judgment after answer.

2. By consent order to try one of the issues presented in the answer the parties waived any right they had to object to the sufficiency of the pleadings in other respects.

3. Errors assigned not embraced in grounds for new trial will not be considered in Court of Appeals.

Alexander, Baker & Reid for appellant.

W. P. D. Bush for appellee.

COMMONWEALTH v. FERRELL.

Filed March 25, 1882.

Appeal from Breckinridge Circuit Court.

Opinion of the court by Chief Justice Lewis, affirming.

1. Bigamy, committed by a second marriage outside of this State, is not an offense within the jurisdiction of the courts of this State under the statute against bigamy.

P. W. Hardin for appellant.

COMMONWEALTH, FOR, &c. v. CREEL.

Filed March 25, 1882.

Appeal from Muhlenburg Circuit Court

Opinion of the court by Judge Pryor, reversing.

1. All peddlers must pay the license required by statute.

P. W. Hardin for appellants.

M. J. Roark for appellee.

ROSE v. COMMONWEALTH.

Filed March 25, 1882.

Appeal from Bourbon Circuit Court.

Opinion of the court by Judge Hines, affirming.

1. Separate injuries to the person may be joined in one indictment. (Criminal Code, section 263.)

2. Objection raised for the first time on the motion for new trial will not be considered by Court of Appeals.

G. C. Lockhart for appellant.

P. W. Hardin for appellee.

BEALL v. BETHEL'S ADM'R.

Filed March 25, 1882.

Appeal from Hardin Circuit Court.

Opinion of the court by Chief Justice Lewis, affirming.

1. Where law and facts have been by consent submitted to the court below the judgment rendered as to the issues of fact must be treated as the verdict of a jury would be.

2. Deposition of party who was also present and testified as a witness was properly rejected in this case.

Wilson & Hobson for appellant.

Hayes & Bush for appellee.

April, 1882—5

COMMONWEALTH v. DUNIVANT.

Filed March 25, 1882.

Appeal from Ballard Circuit Court.

Opinion of the court by Judge Hines, reversing.

1. In indictment for obstructing public highway it is not necessary to designate the section or part of the highway obstructed where the indictment designates the name of the highway and specifies the character of the obstruction and the length of time it continued.

Chas. H. Thomas and P. W. Hardin for appellant.

COMMONWEALTH v. KNOERR.

Filed February 25, 1882.

Appeal from Fulton Circuit Court.

Opinion of the court by Chief Justice Lewis, reversing.

1. Indictment for selling liquor in Fulton county in violation of the act of April 6, 1880, was sufficient in this case.

"The offense and the particular circumstances of the offense charged are stated with such distinctness and certainty as to constitute a complete offense, and also to present a bar to any future prosecution for the same offense."

P. W. Hardin for appellant.

C. H. Wilson for appellee.

VARBLE v. COMMONWEALTH.

Filed March 25, 1882.

Appeal from Oldham Circuit Court.

Opinion of the court by Judge Hines, affirming.

1. Where liquor sold by retail is drunk upon adjacent premises not under the control of the seller the sale is a punishable offense.

"The language (of the statute) implies an ownership or control had or exercised by some one other than the seller."

Robbins & McIntyre for appellant.

P. W. Hardin for appellee.

ROWLETT v. COMMONWEALTH.

Filed March 25, 1882.

Appeal from Hart Circuit Court.

Opinion of the court by Judge Hines, affirming.

1. The indictment is not insufficient for uncertainty in this case, in which the names of the deceased and the accused are the same, for the reason that "the accused is jointly indicted with her husband, Henry Rowlett, and wherever in the indictment the crime is charged the name of Henry Rowlett and of Mary Rowlett are combined as actors in the commission of the crime."

2. The admission of incompetent evidence may be cured by the instructions of the court.

In this case a married woman was accused of the murder of her stepchild by cruel treatment. Evidence that the child was permitted to go insufficiently clad in inclement weather was permitted to be introduced. This was incompetent, but the error was cured by an instruction stating that it was the husband's duty, not that of the accused, to clothe the child in a proper manner.

3. Medical practitioners, who made a post mortem examination, were competent in this case to show the cause of the child's death.

4. Instruction was properly refused in this case as to the law relative to involuntary manslaughter, as there was no evidence to authorize such an instruction.

Woodson & Macy for appellant.

P. W. Hardin for appellee.

HENRY, BARKER & CO. v. L., C. & L. R. R. CO.

Filed March 28, 1882.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Hines, reversing.

1. Instructions must always conform to the issues presented by the pleadings. In this case they do not.

J. & J. W. Rodman for appellants.

Ira Julian for appellee.

YOUNG, &c. v. STROTHER.

Filed March 28, 1882.

Appeal from Henry Circuit Court.

Opinion of the court by Chief Justice Lewis, affirming.

1. Where land is sold at judicial sale subject to dower, the purchaser or his vendees having knowledge thereof, hold the land subject to the dower right.

J. & J. W. Rodman for appellants.

Carroll & Barbour and Webb & Masterson for appellee.

BEAVER v. MARION COUNTY.

Filed March 28, 1882.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Pryor, reversing.

1. For work done on public road under employment of the overseer thereof, the appellant is entitled to be paid in this case.

Belden & Shuck and John D. Fogle for appellant.

R. C. Palmer for appellee.

MALONEY v. SMITH'S ADM'X.

Filed March 28, 1882.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Pryor, affirming.

1. Failure to answer was an admission of the statements of the petition.

2. Whether the name of the defendant is identical with the signature to the note sued on is a question which can not be raised after judgment without an answer.

W. H. Wadsworth & Son for appellant.

T. A. Curran for appellee.

PRATER v. COMMONWEALTH.

Filed March 30, 1882.

Appeal from Carter Circuit Court.

Opinion of the court by Judge Pryor, reversing.

1. On indictment for selling spirituous liquors in District No. 9, evidence that defendant sold in District No. 9 was incompetent unless the indictment averred that that part of District No. 9 in which the sale was made, was embraced in said District No. 9.

In this case, after the sale had been prohibited in District No. 9, a new District, No. 9, was created by the county court out of Districts 8 and 9.

The county court had no power to defeat the decision of the voters of District No. 9 by creating a new district embracing a part of said District No. 9.

J. D. Jones and R. D. Davis for appellant.

P. W. Hardin for appellee.

VAUGHN v. HICKMAN COUNTY COURT.

RENNICK v. SAME.

Filed March 30, 1882.

Appeal from Hickman Common Pleas Court.

Opinion of the court by Chief Justice Lewis, affirming.

For collecting ad valorem tax, to be applied to building bridges in Hickman county, under acts of 1866 and 1873, the sheriffs of that county were entitled to the same commissions as for collecting the county levy for other purposes.

Wm. Lindsay for appellants.

Geo. W. Griffy and E. C. Hodges for appellee.

BURNS, &c. v. HOFFMAN.

Filed February 28, and amended March 19, 1882.

Appeal from Owen Circuit Court.

Opinion of the court by Judge Pryor, reversing.

1. Devise of farm to widow for life, burdened with the support and education of devisor's children and with the right to use the estate in common, should not be construed as requiring the children to remain with the widow on the farm, after they have arrived at full age, to enable them to realize or enjoy the benefits resulting to them from the devise.

Creditors of one of the children can compel the widow to apply his share of the profits of the farm to the payment of his debts.

2. Beneficial interests in a life estate may be subjected to the payment of the debts of the beneficiaries.

3. A widow is entitled to a homestead in a farm devised to her for life by her husband, she having a daughter residing with her on the farm.

4. Homestead should be carved out of the different parcels, throwing it together if practicable.

5. The purchaser of an estate burdened with the support of a third person must obligate himself to discharge that duty, and the chancellor should fix the amount to be paid by him and may require payment by rule.

Barret & Brown and Lillard & Hallam for appellants.

Evan E. Settle for appellee.

MORTGAGES.

An exchange pays its respects to mortgages and mortgagers in the following strain:

In the whole range of sacred and profane literature perhaps there is nothing recorded which has such staying properties as a good healthy mortgage.

A mortgage can be depended on to stick closer than a brother. It has a mission to perform which never lets up. Day after day it is right there, nor does the slightest tendency to slumber impair its vigor in the least. Night and day, and at holiday times, without a moment's rest for sickness or recreation, the biting offspring of its existence goes on.

The seasons may change, days run into weeks, weeks into months and months be swallowed up into the gray man of advancing years, but that mortgage stands up in sleepless vigilance, with the interest of a perennial stream ceaselessly running on.

Like a huge nightmare eating out the sleep of some restless slumberer the unpaid mortgage rears up its gaunt front in perpetual torment to the miserable wight who is held within its clutch. It holds the poor victim with the relentless grasp of a giant; not one hour of recreation; not a moment's evasion of its hideous presence. A genial savage of mollifying aspect while the interest is paid; a very devil of hopeless destruction when the payments fail.

Our liabilities may be evaded or smoothed aside, but a mortgage hangs on with the pertinacity of a bull dog or the grip of a blacksmith's vice. If the interest is not paid it is added to swell its grim parent, the principal, and holds up its horrible front with a harder seeming than before. It will have the pound of flesh which is nominated in the bond, and more terrible than the fearful witches of Macbeth, the threatening fiend, foreclosure, rears up its dreaded menace with the crushing weight of hopeless despair.

Pity for the poor man who has the grim fiend in his household. Every hour of his life is fraught with one intact endurance of misery and dread, embittered with a grievous load he is powerless to shake away.

An episode in the Supreme Court of the United States is related in Gath's letter in the Cincinnati Enquirer, of January 9, 1882, as follows:

"When Oliver Ellsworth was chief justice of the United States he was holding a circuit court at Philadelphia with Judge Chase, who was said to have been disappointed at not obtaining Ellsworth's higher position.

"The lawyer Ingersoll began the argument, but had not proceeded far before Judge Chase exclaimed: 'There is no dispute about it, Mr. Ingersoll. The point is well settled; and there is no need of arguing it.' Mr. Ingersoll then stated his second point, but had scarcely begun to enforce it before he was again interrupted by Judge Chase with: 'That is well settled, Mr. Ingersoll. You need not spend time to argue it.' Mr. Ingersoll became vexed and disconcerted, and was about to make his third point when Chase interrupted him again. Hereupon old Oliver Ellsworth, a Connecticut man, having stood the plantation manners long enough, took out his snuffbox, tapped it, took a pinch, and, looking at the discomfited lawyer, remarked: 'The court has expressed no opinion, sir, upon these points and when it does you will hear it from the proper organ of the court. You will proceed, sir, and I pledge you my word you shall not be interrupted again.' The chief justice then turned his face, full of fire, upon Judge Chase, and looked him through. In spite of Chase's belligerent temper, it is said he quailed and kept still."

THE
KENTUCKY LAW REPORTER.

MAY, 1882.

AN ACT TO ESTABLISH A SUPERIOR COURT, AND
TO REGULATE THE SAME.

§ 1. *Be it enacted by the General Assembly of the Commonwealth of Kentucky*, That there is hereby established a court of justice for the Commonwealth of Kentucky, known as the Superior Court, to consist of three judges, who shall have the same qualifications as are now required by law for Judges of the Court of Appeals. Any two of them may constitute a court for the transaction of business. On the first Monday in August, 1882, there shall be elected, by the qualified voters of this Commonwealth, three persons, qualified as aforesaid, as judges of said court, whose term of office shall commence on the first Monday in September, 1882, and continue until the first Monday in September, 1886. They shall determine by lot who shall be the presiding judge. The State shall be divided into three Superior Court Districts, and one judge of said court shall be elected from each of said districts, by the qualified voters thereof. The said districts shall consist of the following named counties, to wit :

The First District of the counties of Fulton, Hickman, Ballard, McCracken, Graves, Calloway, Marshall, Livingston, Lyon, Trigg, Crittenden, Caldwell, Christian, Todd, Logan, Warren, Henderson, Union, Webster, Hopkins, Daviess, McLean, Muhlenburg, Hancock, Ohio, Butler, Grayson, Breck-

inridge, Hardin, Barren, Allen, Simpson, Edmonson, Meade, and Hart.

The Second District of the counties of Monroe, Cumberland, Metcalfe, Russell, Adair, Green, Taylor, Casey, Larue, Lincoln, Clinton, Wayne, Pulaski, Rockcastle, Boyle, Marion, Garrard, Madison, Washington, Nelson, Mercer, Jessamine, Bullitt, Spencer, Jefferson, Shelby, Henry, Franklin, Anderson, Oldham, Trimble, Carroll, Woodford, Jackson, Laurel, Knox, and Whitley.

The Third District of the counties of Boone, Gallatin, Kenton, Campbell, Bracken, Pendleton, Grant, Owen, Harrison, Robertson, Mason, Scott, Nicholas, Fleming, Bourbon, Fayette, Clark, Montgomery, Bath, Rowan, Lewis, Greenup, Carter, Boyd, Elliott, Menifee, Morgan, Lawrence, Powell, Johnson, Martin, Wolfe, Lee, Estill, Breathitt, Magoffin, Floyd, Owsley, Perry, Pike, Clay, Letcher, Leslie, Harlan, and Bell.

§ 2. The Superior Court shall have exclusive appellate jurisdiction over the final orders and judgments of all other courts of this Commonwealth that the Court of Appeals now has, except as provided in this act, and all the laws now in force in regard to appeals to the Court of Appeals, and the trial thereof, shall be applicable to appeals to the Superior Court, unless otherwise provided in this act.

§ 3. The Superior Court shall not have appellate jurisdiction of any appeal where there is involved (1) the validity of a statute, (2) the title to a freehold, or right to a franchise; (3) nor in cases of felony; (4) the probate of a will; (5) judgments for money or personal property, if the value in controversy be greater than \$3 000, exclusive of interest and costs; and the said court shall have the original jurisdiction in fiscal cases heretofore vested in the Franklin Circuit Court by article nine of chapter twenty-eight of the General Statutes, and so much of said chapter as vested said jurisdiction in the Franklin Circuit Court is hereby repealed, and the terms of said Superior Court for the hearing of fiscal cases shall be as provided for the Franklin Circuit Court in said chapter.

§ 4. When the record does not show the amount in controversy, the court rendering the decision from which the appeal

is asked shall, on motion of either party, determine whether the amount is over three thousand dollars, and such decision shall be conclusive as to the jurisdiction of the appeal.

§ 5. The Court of Appeals shall have appellate jurisdiction over the final orders and judgments of the Superior Court in all cases except the following:

1. Those for fines or for the recovery of money or personal property, where the amount of the fine or the value in controversy is less than one thousand dollars, exclusive of interest and costs.

2. Those where the judgments of the lower court have been affirmed by the Superior Court without a dissenting vote. But if in any case coming within either of the above exceptions any two of the judges of the Superior Court shall certify that, in their opinion, the question involved is novel, and is one of sufficient importance, the party against whom the decision was rendered shall be entitled to take the same by appeal to the Court of Appeals as in other cases.

§ 6. If an appeal shall be taken to the Court of Appeals of which the Superior Court has jurisdiction, or if taken to the Superior Court when the Court of Appeals has jurisdiction, it shall not be dismissed, but shall be transferred to the court having jurisdiction.

§ 7. All appeals from the Superior Court to the Court of Appeals shall be prayed and granted in the Superior Court. But no appeal shall be granted after six months from the time the right to appeal first accrued, unless the party applying therefor was a defendant in the original action, and an infant not under coverture, or of unsound mind, or a prisoner who did not appear by his attorney—in which cases an appeal may be granted to such parties, or their representatives, within twelve months after their deaths or the removal of their disabilities, whichever may first occur.

§ 8. The Clerk of the Court of Appeals shall be *ex officio* Clerk of the Superior Court. In appeals pending in the Superior Court, he shall discharge the duties now required of him by law in similar cases in the Court of Appeals, and shall be allowed the same fees for like services. Whenever an appeal is granted from the Superior Court to the Court of Appeals,

the Clerk shall transfer the case from the docket of the Superior Court to that of the Court of Appeals, and the same record upon which the case was tried in the Superior Court shall be used in the Court of Appeals. All laws that are now in force regulating appeals from other courts to the Court of Appeals, not inconsistent with this act, shall, in so far as the same are applicable, regulate appeals from the Superior Court.

§ 9 The provisions of chapters one, two and three, of title eighteen, of "An act regulating practice in civil cases," except section 766, and all amendments thereto, and articles two and three, of chapter first, of title nine, of "An act to regulate practice in criminal cases," except section 359, and all amendments thereto, shall be applicable to the Superior Court. The party taking an appeal to the court established by this act shall file with the clerk thereof a certified transcript of the record, which shall be delivered to the court upon the submission of the case, and no judgment shall be valid or binding until each of the judges of said court sitting in the case shall make or sign an indorsement upon the opinion delivered thereon that he has examined the record of the case.

§ 10. The Superior Court shall hold its terms at Frankfort, Kentucky, and it shall be the duty of the officers who now provide rooms for the Court of Appeals to provide suitable rooms for the Superior Court, and the expenses thereof shall be paid in the same manner as those of the Court of Appeals are now paid.

§ 11. Process from the Superior Court shall be executed in the same manner, and by the same officers, as similar process from the Court of Appeals, and the officers shall receive the same fees for like services. And chapter ninety-nine of the General Statutes of Kentucky shall be applicable to the Superior Court.

§ 12. Power is vested in the Superior Court to administer oaths, punish contempts, and make rules consistent with law for the government of its proceedings; and to any judge thereof power is give to reinstate attachments and injunctions in any case where the appeal, if taken, would lie to the Superior Court.

§ 13. Sections one, two, three, four, five, nine, eleven, and twelve, of article eleven, chapter twenty-eight, of the General Statutes of Kentucky, shall be applicable to the Superior Court.

§ 14. There shall be two terms of the Superior Court, but the court shall be held every juridical day in each year, except in the months of July and August, if the same shall be necessary for the disposal of all the business on the docket. If there should be no court at any time, owing to unavoidable absence of two of the judges, the court shall stand adjourned until a quorum can be had.

§ 15. The Superior Court shall, by its orders, declare what shall be regarded as a term, or the commencement or end of a term, in order to conform to any law or rule of court requiring anything to be done before the commencement, or after the end of a term, or within a certain number of terms, and said orders shall be so framed that there shall be two terms in each year.

§ 16. The laws now applicable to filling vacancies in the Court of Appeals shall be applicable to filling vacancies in the Superior Court.

§ 17. The Judges of the Superior Court shall each receive an annual salary of \$3,600, to be paid monthly out of the Treasury.

§ 18. It shall be the duty of the Attorney General to represent the Commonwealth of Kentucky in all cases pending in the Superior Court to which it is a party, and he shall be allowed the same fees therefor, and be paid in the same manner as by law he is now paid in similar cases in the Court of Appeals.

§ 19. When the case has been decided by the Court of Appeals upon an appeal from the Superior Court, it shall not be necessary for a mandate to issue to the Superior Court, but the mandate shall go directly from the Court of Appeals to the court from which the case was appealed to the Superior Court, and the laws applicable to other mandates from the Court of Appeals shall be applicable to mandates in such cases, and to mandates from the Superior Court.

§ 20. This act shall not affect appeals granted prior to the first Monday in August, 1882, but the Court of Appeals shall transfer to the Superior Court all appeals pending in the Court of Appeals on said date that have not been heard, and of which

the Superior Court has jurisdiction, and may also transfer any of the appeals under submission within the jurisdiction of the Superior Court.

§ 21. Elections under this act shall be conducted by the same officers, and in the same manner as other elections for officers for the State at large.

§ 22. The Superior Court shall have original jurisdiction of escheats, and all acts or parts of acts inconsistent with this section are hereby repealed.

§ 23. All laws and parts of laws inconsistent with this act, or any part thereof, are hereby repealed.

KENTUCKY COURT OF APPEALS.

COMMONWEALTH v. OVERBY.

(Filed April 1, 1882)

1. *Bail may surrender the defendant at any time before forfeiture of the bond, and be thereupon exonerated.*

2. *Bail may arrest the defendant, or by an indorsement upon a certified copy of the bail-bond, may direct the arrest to be made by any peace officer of the State, or by any other person over twenty-one years of age designated in the indorsement.*

3. *If the defendant is arrested or surrendered, the court may remit the whole or part of the sum specified in the bond.*

4. *When the appearance of the defendant is prevented by the Commonwealth in discharge of his bail-bond or recognizance, she should not enforce the penalty against the bail for mere non-compliance.*

5. *When the appearance of the defendant in the State Court was prevented by an arrest and conviction in the U. S. Circuit Court for the same offense, counterfeiting, the defendant was thereby exonerated.*

6. *When the defendant is arrested and convicted in the U. S. Circuit Court for counterfeiting, he could not be again tried in the State court for the same offense, and, therefore, his bail in the State court is exonerated by the conviction in the U. S. Circuit Court.*

Appeal from Christian Circuit Court

Opinion of the court by Chief Justice Lewis.

On the 19th of November, 1880, appellee executed a bail bond for the appearance of John H. Overby in the Christian Circuit Court, at its ensuing February term, to answer the charge of passing a counterfeit United States Treasury note, but the defendant having failed to appear the bond was forfeited and summons issued against appellee.

In his response he alleged the following facts, which are conceded: That on the day following the execution of the bail bond, Overby was arrested by an officer of the United States and carried before a United States Commissioner, and by him held to appear and answer at the next term thereafter of the United States Circuit Court, held in the city of Louisville, the same charge for which he had been required to appear and answer in the State Court; that failing to give bail he was committed to the jail of Jefferson county, where he remained until February, 1881, when he was indicted, tried and convicted in the United States Court for the offense, and sentenced to confinement in the penitentiary of the State of New York for the term of five years.

The court below having overruled the demurrer to the response and dismissed the proceeding against appellee, the Commonwealth prosecutes this appeal.

By the terms of the bail bond in such cases the bail undertakes that the defendant shall appear in court at the time and place designated, to answer the charge upon which he is in custody, and at all times render himself amenable to the orders and process of the court in the prosecution of the charge; or, if he fail to perform either of these conditions, that the bail will pay to the Commonwealth the sum at which the penalty is fixed.

But it is expressly provided by law that the bail may, at any time before the forfeiture of the bond, surrender the defendant to the jailer of the county in which the prosecution is pending, and be thereupon exonerated. And for the purpose of surrendering him, the bail, at any time before judgment against him, and at any place within the State, may arrest the defendant, or by an endorsement upon a certified copy of the bail bond, may direct the arrest to be made by any peace officer of the State, or by any other person over twenty-one years of age designated in the endorsement. And it is also provided that, if before judgment is entered against the bail, the defendant be surrendered or arrested, the court may, at its discretion, remit the whole or part of the sum specified in the bail bond.

There is, therefore, in the bail bond an implied undertaking on the part of the Commonwealth that the bail shall not be

hindered or prevented by herself, or by any other authority within the limits of the State, in surrendering the defendant before the forfeiture of the bond, and the father undertaking that the Commonwealth has the power, through her peace officer, to arrest the defendant, if within the State, and will so arrest him at any time before judgment against the bail, when he shall so direct.

It has accordingly been held by this court that when the Commonwealth, by her own act, prevents the appearance of the defendant in discharge of the bail bond or recognizance, she should not enforce the penalty against the bail for non-compliance. *Alquin v. Commonwealth*, 3 B. M., 349; *Kirby v. Commonwealth*, 1 Bush, 114.

Although in this case the bail was not deprived of his right to surrender the defendant and thus to become exonerated by the Commonwealth, he was effectually prevented exercising that right, as was the defendant prevented appearing in discharge of the bail bond by the United States Government. And in our opinion it does not make any difference whether the non-appearance of the defendant, in compliance with the bail bond, be caused by the Commonwealth or by the United States Government, for the authority of neither can be resisted by the bail or by the defendant, and in both cases the bail is deprived of the aid and protection of the Commonwealth, to which, under the contract, he is entitled.

Upon principle, as well as according to the weight of authority in this State, the facts set forth in the response by appellee constitute a sufficient defense to the proceeding against him, and the demurrer was properly overruled.

In the case of the *Commonwealth v. Terry*, 2 Duvall, 383, it was held by this court that, in a proceeding against the surety upon a forfeited recognizance, it was a sufficient defense that the defendant, being a soldier in the Federal army, was refused a furlough, and by reason thereof was unable to appear in discharge of the recognizance. And in the case of the *Commonwealth v. Webster, &c.*, 1 Bush, 616, it was held that the defendant, having been arrested by a provost marshal and taken from the county where the prosecution against him was pending, the bail should not be made liable upon the bail bond, because

he was, by the United States officer, deprived of the power to surrender the defendant.

But the case of the *Commonwealth v. House*, 13 Bush, 680, though the facts are not fully set forth, appears to be somewhat in conflict with the two just referred to. In that case it is conceded that if the Commonwealth, before the time stipulated for his appearance, arrests the principal and detains him at another place, so that he cannot appear at the time and place mentioned in the bail bond, the bail is exonerated. But it is intimated that the bail would not be exonerated when the principal is arrested and detained by the United States Government.

Perceiving no reason why the bail should be exonerated in the one case and not in the other, we must adhere to the doctrine announced in the two cases in 2 Duvall and 1 Bush, *supra*, and overrule the case in 13 Bush, *supra*, so far as it is inconsistent with this opinion.

But there is another ground upon which the bail in this case should be exonerated.

The object of a bail bond or recognizance is to secure the appearance of the defendant in the court having jurisdiction, that he may answer the charge against him, and, if convicted, render himself in execution thereof.

Manifestly the defendant in this case could not have been tried and convicted even if present in the Christian Circuit Court, after having been tried and convicted of the same offense in the United States Circuit Court.

For though tried by the United States Court, still it was the same offense for which he was held to answer in the State Court, denounced alike by the laws of the United States and of this State.

The judgment is affirmed.

P. W. Hardin for appellant.

G. A. Champlin, Wood & Wood and Feland & Sebree for appellee.

WEAREN & EVANS v. SMITH, &C.

(Filed April 6, 1882.)

1. *Appeal must be taken within two years*, the time required by the Code, and was taken in time in this case wherein the judgment was rendered January 22, 1878, a copy thereof filed in the office of the Clerk of the Court of Appeals, appeal granted and summons issued January 18, 1880, and schedule and assignment of errors filed in the office of the clerk of the inferior court, January 28, 1880, but the transcript not filed in the office of the Clerk of the Court of Appeals until August 10, 1880.

2. *Judgment quashing return upon order of attachment* is not a final order in the meaning of the Code, from which an appeal will lie.

Appeal from Lincoln Common Pleas Court.

Opinion of the court by Chief Justice Lewis.

Appellee moves to dismiss the appeal in this case upon two grounds: First, because it was not taken within the time required by the Civil Code. Second, because the judgment appealed from is not a judgment or final order, in the meaning of the Code, from which an appeal will lie.

It appears the judgment appealed from was rendered January 22, 1878; that January 18, 1880, a copy of the judgment was filed in the office of the clerk of the Court of Appeals, the appeal granted, and summons issued; and that January 28, 1880, the schedule and assignment of errors were filed in the office of the clerk of the inferior court. But the transcript was not filed in the office of the clerk of the Court of Appeals until August 10, 1880.

Counsel for appellee contends that, the appeal having been granted by the court below, it was the duty of appellants to file in the office of the clerk of that court, within ninety days after the granting of the appeal, his schedule and assignment of errors as required by sub-sec. 47, sec. 737, Civil Code, and to file in the office of the clerk of the Court of Appeals, at least twenty days before the second term of this court next after the granting of that appeal, the transcript as required by sections 738 and 739, and that, having failed to do so, they lost their right of appeal, and the clerk of the Court of Appeals had no authority to thereafter grant it.

By reference to sub-sec. 47, sec. 737, it will be observed that it applies exclusively to appeals granted by the inferior

courts, and not to those granted by the clerk of the Court of Appeals. And although the failure of the appellant to file the schedule and assignment within the time prescribed in that subsection, as well as his failure to file the transcript within the time required by sections 738 and 739, are each a cause for dismissal of his appeal; still, even after the appeal granted by the inferior court has for such causes been dismissed, the clerk of the Court of Appeals is authorized and required by sec. 734, upon application of either party or his privy, upon filing in the office of said clerk a copy of the judgment from which he appeals, to grant to him, as matter of right, an appeal at any time within two years next after the right to appeal first accrued.

Sections 738 and 739 are applicable to appeals granted by the clerk of the Court of Appeals, and also to those granted by the inferior courts; and in each case the appellant is required to file the transcript in the office of the clerk of the Court of Appeals at least twenty days before the first day of the second term of said court next after the granting of the appeal by the inferior court, or by the clerk of the Court of Appeals, as the case may be, unless the court extend the time, as, for cause shown, may be done.

By sub-sec. 3, sec. 739, it is made the duty of the appellant to file with the transcript his assignment of errors, unless he shall have filed it in the clerk's office of the inferior court pursuant to the provisions of sec. 737. And when the appeal is granted by the clerk of the Court of Appeals, and the appellant chooses to file only part of the record, he is required by sub-sec. 7, sec. 737, to file in the office of the clerk of the inferior court his assignment of errors and schedule.

But while in all cases in which the appeal is granted by the inferior court, except those mentioned in sub-sections 2 and 3, sec. 737, the appellant is required to file his assignment of errors and schedule in the office of the clerk of such court within ninety days after the granting of the appeal; no time is prescribed in which they shall be filed, when the appeal is granted by the clerk of the Court of Appeals, nor is the failure to so file expressly made cause for dismissing the appeal. In our opinion, however, they should be filed a sufficient length of time before the end of the period within which the transcript is

required to be filed to give the notice required by sub-sec. 7, a. b. sec. 737.

As in this case the appeal was granted, and the transcript, assignment of errors, and schedule were all filled in the manner and time required by the Civil Code the motion to dismiss the appeal can not be sustained upon the first ground.

Various errors are assigned by appellant. But as only one of them is relied upon, only that one will be considered.

It appears that a summons and order of attachment were issued, directed to the Marshal of Somerset, and by him served upon the defendant in the action and upon appellee, who was a garnishee, and it is to the order of court quashing the return of the officer upon the order of attachment as to appellee that appellant complains.

We do not consider the quashing of the return a judgment or final order from which an appeal will lie; nor as the attachment was as to appellee discharged, and conceded by counsel for appellant to have been properly done, do we consider it material.

Wherefore, upon the second ground, the motion is sustained and the appeal dismissed.

Hill & Alcorn and J. S. & R. W. Hocker for appellants.

M. G. Saufley for appellee.

WEAREN & EVANS v. MATHENEY.

(Filed April 6, 1882.)

1. *Action may be brought against a garnishee who fails to make a disclosure satisfactory to the plaintiff, and a personal judgment against him may be sought by petition or amended petition.*

In such an action the plaintiff may sue out attachment in same manner as in other actions.

Appeal from Lincoln Common Pleas Court.

Opinion of the court by Chief Justice Lewis.

On the 19th of April, 1877, Wearen & Evans filed their petition against one P. F. Smith to recover judgment against him upon two promissory notes. An attachment was issued against the property of Smith, Matheney and others being summoned as garnishees.

But on the 19th of July, 1877, before the term of court at which the garnishees were required to answer, an amended petition was filed and an attachment issued against the property of Matheney.

At the September term of the court judgment by default was rendered against Smith and the attachment sustained as to him. But as to Matheney the attachment was discharged, and the demurrer filed by him to the amended petition sustained and the amended petition dismissed, and the summons on the attachment against him quashed.

This action was brought on the 20th of May, 1878, against Matheney alone, under sec. 227 of the Civil Code.

In the petition, in addition to the foregoing facts, it is alleged that no part of the judgment against Smith had been satisfied, that the defendant, Matheney, was indebted to Smith in a large sum, and that the answer and disclosure made by Matheney, as garnishee in the action of Wearen & Evans against Smith and others, is untrue.

An attachment against his property was issued, and a personal judgment sought against him.

The court having sustained the special demurrer filed, and dismissed the petition and amended petitions, this appeal is prosecuted by the plaintiffs in the action.

The ground of the demurrer sustained by the court is that there was at the time another action pending in the court between the same parties and for the same cause.

By sec. 227, Civil Code, it is provided that if a garnishee fail to make a disclosure satisfactory to the plaintiff, the latter may bring an action against him by *petition* or *amended* petition in the same manner, and the proceedings therein shall be the same as in other actions, and the plaintiff may procure an order of attachment in the same manner, and the proceedings thereupon shall be the same as authorized concerning attachments generally.

Under that section it is clear that if the garnishee fail to make a disclosure satisfactory to the plaintiff the latter may, either by an amended petition in that action or by another action, seek a personal judgment against him, and also obtain an attachment as in other actions.

When this action was commenced there was no such action, as is authorized by that section of the Code, pending against appellee, but he was before the court in the case of *Wearen & Evans v. Smith, &c.*, simply as a garnishee, and answered as a garnishee.

It is true an amended petition had been filed in that action, and attachment issued against him. But they were both premature, and the petition was properly dismissed and the attachment discharged.

There was not, in our opinion, at the time the demurrer was sustained to the petition and amended petition in this case another action pending between the same parties for the same cause.

Wherefore the judgment of the court below is reversed and cause remanded, with directions for further proceedings consistent with this opinion.

J. S. & R. W. Hocker and Hill & Alcorn for appellants.

M. C. Saufley for appellee.

GERMANIA LIFE INSURANCE COMPANY, OF NEW YORK *v* RUDWIG, &C.

(Filed April 13, 1882.)

1. *False declarations in application for life insurance, when made part of the policy, as in this case, avoid the policy, when they are material or calculated to affect the risk.*

See in opinion examples of immaterial false representations, not affecting the validity of the policy.

2. *The act of Feb. 4, 1874, providing "that all statements and descriptions in any application for a policy of insurance shall be deemed and held representations and not warranties, nor shall any misrepresentation, unless material or fraudulent, prevent a recovery on the policy," was but declaratory of the law as it then existed in this State.*

3. *Farmers & Drovers' Insurance Company v. Curry, 13 Bush, 312, is overruled to the extent indicated in the opinion herein.*

4. *By removing from Louisville, Ky., to, and residing in, the State of Mississippi, in violation of the stipulations of the policy, and without the consent of the company, the assured forfeited the policy in this case.*

But the right of the company to insist upon the forfeiture of the policy was waived by the agent in Louisville continuing to receive the premiums after, and with full knowledge of the removal, and remitting such premiums to the office of the company in New York.

By receiving and remitting the premiums for six years after the removal, the agent is presumed to have acted with the knowledge and consent of the company.

5. *Denials in reply were sufficient to place burden on defendant in this case.*

Issue being formed by reply and rejoinder, the surrejoinder is regarded as out of the record.

6. *Foreign record of the death of the parents and birth of the assured were read as evidence in this case.*

Appeal from Jefferson Common Pleas Court.

Opinion of the court by Judge Pryor.

This action was instituted in the Jefferson Court of Common Pleas by *Rudwig & Banchart* (the appellees) v. *The Germania Life Insurance Company, of New York*, on a policy of life insurance by which the life of Bernard H. Gottshelf was insured for their benefit. At the time the policy was issued Gottshelf was a resident of the city of Louisville. He removed from that city to Vicksburg, Miss., and died near the latter city, of yellow fever, on the 7th of September, in the year 1878.

The petition contains the usual averments essential to a cause of action on such a policy. In the 2d paragraph of the answer, or that portion of it necessary to be considered, the company alleges that the policy was issued on the faith of a written declaration by the plaintiffs and Gottshelf, dated in April, 1869, and made part of the contract of insurance, by the terms of which it was provided *that it should become void or inoperative if the declaration made, or any part of it, should be found in any respect untrue.*

It is further alleged that the following statements found in the declaration made, and upon which the policy is based, were false. 1st. The plaintiff stated in the declarations that Gottshelf was then insured for \$5,000 in the *Ætna Life Insurance Company*, which was untrue.

2d. That Gottshelf was born Feb 5, 1819, when in fact he was born the 5th of Feb, 1816. 3d. That Gottshelf's father died of old age (93 years old), when he died of nervous apoplexy, at the age of 82 years. 4th. That Gottshelf's mother died of old age (72 years old), when she died at the age of 65 years, of paralysis of the lungs.

It is alleged that all of these statements were untrue, and the defendants did not discover that they were false until after the death of the assured.

A reply was filed to this answer, and also a rejoinder by the defendant. It is insisted that the denials contained in the reply of the facts alleged by way of defense in the answer, are not sufficiently specific, and therefore the statements of the answer must be regarded as true. The reply denies that the declaration filed with the answer contains any untrue statement, and further alleges that all of the statements therein contained are fair and true answers to the questions asked, and then proceeds to deny specially each averment of the answer, with reference to the particular statements said to be false. We think the reply made an issue and placed the burden on the defendant of sustaining his answer by proof.

The third paragraph of the answer avers that the policy provided that if Gottshelf should visit between the first day of July and November, without the consent of the defendant, those parts of the United States which lies south of North Carolina, Tennessee, Arkansas and Kansas, the policy should cease, and that, without its knowledge or consent, the said Gottshelf visited between the first day of July and the first day of September, 1878, the town of Beachland, in Warren county, Miss., which place is south of the prohibited line, and there died of yellow fever, on the 7th of September, 1878.

The appellees, for reply to this paragraph of the answer, admit that the assured Gottshelf removed to Mississippi in the year 1870; that this was done with the knowledge and consent of the company, and, in consideration of said removal, the defendant required the appellees to pay, and they did pay, an extra premium of thirty dollars for two years and *until they were notified by the defendant that no further extra premium would be required, and the regular premiums were accepted afterwards by the defendant in full of all claims upon said policy.*

To this the appellant rejoins and admits that on the 19th of August, 1870, for an extra premium of thirty dollars, it gave the plaintiff a written permit that Gottshelf *might reside or travel* in Mississippi until, but not after, July 1, 1871, and that on the 17th of August, 1871, for another extra premium of thirty dollars, it gave the plaintiff another written permit that Gottshelf *might reside or travel* in Mississippi until, but not after, July 1, 1872, denies that it ever consented to any visit or change of

residence after the limitation of the second permit, or that it accepted any premiums after July 1st, 1872, with any knowledge that Gottshelf resided or was or had been at any time since 1st of July, 1872, in the prohibited territory.

There was a sur-rejoinder filed to this rejoinder in which the appellees deny that the defendant never accepted any premium after the 1st of July, 1872, *with any knowledge* that the said Gottshelf resided in Mississippi after July 1, 1872, and denies that defendant did not know until after the death of Gottshelf that he had resided or traveled in Mississippi after the 1st of July, 1872, and the pleader then proceeds with other denials in the same manner. This certainly is bad pleading, and would be so held but for the reply which sets up specifically the consent of the company to the removal, and its acceptance of the premium, with a knowledge of that fact. The rejoinder, in fact, made the issue except as to the terms of the consent alleged to have been specially given. The condition upon which the consent was given for the years 1871 and 1872, as alleged by the appellant, are admitted as true.

While the denial that the company had no knowledge raises no issue, an averment that the company knew, and consented to the removal, is sufficient, and this averment is found in the reply traversed by the rejoinder. The sur-rejoinder may be regarded as out of the record, and the issue is formed, the appellees admitting the conditional consent alleged to have been given by the company in the years 1871 and 1872.

In determining the questions involved in this case, we will proceed to consider, first, the effect of the declaration by the assured of the existence of certain facts that, by the agreement of the parties, constitutes the basis of the contract evidenced by the policy.

There is proof conducing to show that Gottshelf was not insured in the *Ætna Life Insurance Company* at the date of the policy, the insurance in that company having expired some time previous to the date of the insurance with the appellant. It is also questionable whether the insured was born on the 5th of February, 1816, or the 5th of February, 1819.

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There is proof also tending to show that Gottshelf's father died at the age of 82 years instead of 93 years old, and his mother died at the age of 65 and not 72 years old as stated, and that his father died of nervous apoplexy, and his mother of paralysis of the lungs, instead of old age as stated in the declaration made. The policy of insurance provides that the insurance is made *in consideration of the representations made to them in the application for this policy*; and further provides *"if the declaration made by or for the assured, or any part thereof forming part of this contract, and upon the faith of which this contract is made, shall be found in any respect untrue, the policy shall cease and be null, void and of no effect, and the company shall not be liable for the sum assured, or any part thereof."* There is no denial made by the appellees as to the character of the statements made in the application for the policy, and the principal question on this branch of the case made by counsel for the appellant is that the court erred in failing to instruct the jury or to adjudge, as a matter of law, that the statements contained in the application were made material by the contract of insurance, and if not substantially true, although immaterial to the risk, the policy is avoided. In other words, if any of the statements made, however immaterial to the risk, were untrue, whether made with a fraudulent purpose or from ignorance as to the truth or falsity of the statement, the appellees cannot recover. Several cases have been cited by counsel having a close analogy to the case before us, and a careful consideration of those, as well as other cases to which our attention has been called, go far in support of the position assumed by counsel. *Miles v. Connecticut Mutual Life Insurance Company*, 3 Gray; *Campbell v. New England Life Insurance Company*, 98 Mass.; *Connover v. Massachusetts Life Insurance Company*, 3 Dillon, 321; *Anderson v. Fitzgerald*, 4 Home on Trust Cases.

These cases all proceed upon the idea that the parties themselves have determined that all the minute questions and answers contained in such declarations should become a part of the contract, and the only inquiry to be made by a court or jury is whether the statements made are true or false. As to the statements made in regard to the age of the insured, and

the respective ages of his father and mother, and the cause of their death, the jury has, by a special finding, said they were true, and this obviates the necessity of passing upon the errors assigned as to these findings, unless, as is asserted by counsel, the special findings are not sustained by the evidence. The deposition of one Eldod is taken in the Kingdom of Bavaria, who states that he is the keeper of the register of births and deaths of a Jewish congregation in Aleinerdinger, kept and furnished by law, and from the register it appears that the father of the insured died at the age of 82, and his mother at the age or 65; one dying of nervous apoplexy, and the other with paralysis of the lungs, and further, that Gottshel, the assured, was born in February, 1816, instead of 1819.

The son of Gottshel states that it was the custom of the family to always celebrate the day of the birth of each member, and from this fact and the statements there made by the father, he was 60 years of age at his death, and in this he is corroborated by another witness. The Bavarian register, without any evidence as to who made the record in regard to Gottshel's family, or how the party making it derived the information it purports to give, either as to the ages of the different members of the family or the diseases of which they died, might well be held by a court or jury as insufficient to overthrow the statements made by Gottshel in order to convict him of falsehood, when he had no motive to act otherwise than in the best of faith between his creditors, who were having his life insured, and the company issuing this policy. These special findings were, in our opinion, sustained by the evidence.

It is urged, however, that the assured Gottshel was not insured at the time of his application in the *Ætna Life Insurance Company*, in the sum of \$5,000, and the jury having returned a special finding to that effect, it avoided the policy. It seems that Gottshel had been insured in the *Ætna Insurance Company* for \$10,000, and that this insurance ceased by reason of his failing to pay the premium in January, 1868. It is shown by an agent of an insurance company that such a statement, if untrue, is not material to the risk, and it is not contended that it would have controlled the action of this company in making the contract if the fact had been known.

We can well see how a concealment, fraudulently made, or a knowledge of like contracts with other companies, innocently withheld, should avoid the policy. The greater the amount of insurance, either for the benefit of the family of the assured or his creditors, the less would be the anxiety of the assured with reference to their protection, and with this feeling of security on his part, it might in some instances, at least, cause the assured to be less careful of his own health, or more liable to indulge in habits calculated to shorten life; but here there was nothing withheld from the company calculated to increase the risk. If trusting in the fact that the *Ætna Insurance Company* was vigilant through its medical examiners in selecting the subject for insurance, it had the benefit of such an examination of Gottshelf, so we find, at least from the evidence in this case, that no injury could have resulted from this oversight on the part of the assured at the time of making the application. In the construction of insurance contracts it is difficult to distinguish between a representation made upon the truth of which the contract was entered into, and an express warranty as to the truth of the representation made. It is very properly said that the contract of insurance is entered into by the company upon the faith of the representations made, but it is further insisted that if made part of the contract the representations then become express warranties.

If incidental to the contract, but upon the faith of which it is entered into, the representation, if false or untrue, must be material in order to avoid the policy, but when made a part of the contract the representation made, whether material to the risk or not, if untrue avoids the contract. So in this case, if Gottshelf had made the statement that his father died at the age of eighty-two years, when in fact he died at the age of ninety-nine, this false or untrue statement would have rendered the contract null and void. There is no doubt that an insurance company relies upon the truth of the representation made in either case, and equally certain that if untrue and material to the risk, no inquiry will be directed for the purpose of determining whether the statement was fraudulently or innocently made. The injury to the insurer is the same, but where no injury can possibly result to the company, where is the breach and what is the

penalty? It would certainly be no breach of warranty in a chattel if the quality was better than that warranted, unless the inferior article alone would conform to the wants of the purchaser, and if a breach the damages would be merely nominal, but in regard to insurance contracts that which neither increases or diminishes the risk and which could not have influenced the action of either party in making the contract, is seized upon as a ground for forfeiting the entire policy and depriving the assured, not only of all the benefits of the contract, but permits the insurer to retain all the premiums paid.

While the contract of insurance may be peculiar to itself, "it must be liberally construed in favor of the insured so as not to defeat, without a plain necessity, his claim to indemnity, which, in making the insurance, it was his object to secure. 'There is nothing about an agreement for insurance intrinsically more sacred or inviolable than in an agreement about any other subject-matter.'" May on Insurance, pages 111-112. Such contracts are to be interpreted like other agreements and must be governed by the same rules, good faith (says the same author) being especially required, as one of the parties is necessarily less acquainted with the details of the subject of the contract than the other. In the declaration made in the present case it is said: "That all the answers and declarations made are true, and that we have not omitted to communicate, nor *concealed any material circumstance*, and we agree that this declaration shall be the basis of the contract for insurance of the said life." Following the ordinary rule in regard to the interpretation of contracts, and giving to this declaration its full legal effect when inserted in the contract, and it is evident the parties were looking to facts that were *material to the risk* and not to the minute statements as to the precise age of the ancestors of the assured, their nationality or any other statement not calculated to affect the risk in the slightest degree, and that could not have possibly induced the company to enter into the contract.

The application in this case constitutes a part of the policy, and that means simply, that the assured has not withheld any *material* fact from the company, and, when construed with the entire contract, means nothing else. This court, in the case of *Galbraith's adm'r v. The Arlington Mutual Life Insurance Com-*

pany, reported in 12 Bush, in discussing a similar question, said: "Whether the representations alleged to have been untrue are warranties is not necessary in this case to decide. The first instruction quoted made the liability of the appellee to depend upon the truth of every statement made by the assured, which was enumerated in that instruction, whether the risk was thereby increased or not, and in this respect was erroneous. The language is not to be taken literally, but is to be construed with reference to the subject-matter and the business to which it relates." In the case of the *Continental Insurance Company v. Wall*, decided at the present term, the assured, in her application, which was made the basis of, and formed a part of, the contract, undertook and warranted that the building was of the value of \$3,000, when in fact, as appeared from the proof, it was worth a less sum.

This constituted one of the grounds of defense by the company, and this court held that such a representation, although made part of the contract, ought not, when made in good faith, to amount to a warranty or affect the rights of the parties in any way, and further, if a difference in the opinion of the insured with others as to the value of the property insured will defeat the recovery, it is creating a test difficult for a court or jury to determine, and must render valueless nearly every policy similar in its character in the hands of those who have insured. Before such a defense can prevail it must appear that the party falsely, and with the purpose of deceiving the company or its agent, placed an over valuation on the property insured. The case cited was where the contract of insurance had been executed since the passage of the act of February 4, 1874, providing "that all statements and descriptions in any application for a policy of insurance shall be deemed and held *representations and not warranties*, nor shall any misrepresentation, unless material or fraudulent, prevent a recovery on the policy." This act, in our opinion, was but declaratory of the law as it then existed in this State, and we find no opinion to the contrary, unless in the case of the *Farmers and Drovers Insurance Company v. Curry*, reported in 13 Bush, 312.

In that case the building was not occupied, as stated in the application and policy. It was also encumbered by a vendor's

lien and had become vacant without notice to the company. These constituted the grounds of defense. This court, in that case, said: "The evidence conduced to establish the facts upon which each of the propositions rest, and such being the case the judgment below was reversed. That the statements were material to the risk could not have been successfully questioned, but the court proceeds in that case to discuss the effect of the act of 1874, now a part of the General Statutes, and says that statute should control *when the policy is silent as to the effect of the statements made, but when the parties undertake in the policy to declare the meaning and effect of its stipulations, they have the right to do so and can not be controlled by the statute.* The court was evidently considering the importance of the statements made in the policy to the party giving the indemnity at the time this utterance was made. The very purpose of the statute was to bring such representations and warranties within its provisions, and to prevent the insured from losing his indemnity upon either a representation or warranty that was not fraudulent or material to the risk, and when parties have entered into an insurance contract; since the adoption of the statute they must be held as contracting with reference to the statutory provision, and we might add subject to a like rule recognized by this court, regardless of the statute, and therefore that portion of the opinion in the case of the *Farmers and Drovers Insurance Company v. Curry*, expressing a contrary view, is overruled.

The Supreme Court held, in the case of the *National Bank v. Insurance Company*, on a policy like this, that a representation as to value was not to be construed as a warranty. 5 Otto, 673.

Forfeitures are regarded by courts with but little favor, and while the non-payment of premiums or a representation of facts fraudulently or innocently made, if untrue and material to the risk, or such as would induce the insurer to enter into the contract, must prove fatal to the policy when minute and trivial questions are propounded and answered, having no bearing or influence on the minds of those about entering into the contract, and not material to the risk, the parties can not be affected by them. An honest belief in the truth of the statement made, when not material to the risk, should not avoid a policy, if the statement should prove to be untrue, and to adjudge

that it works a forfeiture is contrary to the intent and meaning of the parties, and subversive of that rule of good faith and fair dealing that should enter into and form a part of every insurance contract.

The principal question we think in this case arises out of the declaration and agreement made by the assured that Gottshelf would not reside or visit certain parts of the United States lying south of North Carolina, Tennessee, Arkansas and Kansas, between the first days of July and November, without the consent of defendant.

Gottshelf removed from Louisville to the city of Vicksburg, and his creditors, the appellees, upon the payment of an extra premium of thirty dollars, obtained the consent of the company (the appellant) that he might reside or travel in Mississippi up to July 1, 1871, and by the payment of a like extra premium obtained the appellant's consent that he might reside or travel in the same State up to July, 1872. After this time, viz: July, 1872, no permit was asked or consent obtained from the company, and Gottshelf still continued to reside in or near Vicksburg until his death in September, 1878. The regular premium was paid each year from the date of the insurance until his death.

It is apparent from the proof that the appellees knew, and if not, they must be presumed to have known the terms of the policy, and that by Gottshelf's removal to Vicksburg, without the consent of the appellant, the policy became void. It appears from the testimony that the appellees, after obtaining the written permits from the company, proposed to the agent of the company at Louisville to continue the payment of the extra premiums, and were informed by the agent that he would notify the company and see that the policy was not forfeited. These suggestions were made time and again to the agent, the latter continuing to inform them that it was not necessary to make any additional payments, and, with this understanding and the continued offer by the appellees to pay the extra premium, the agent continued to receive the regular premiums and to forward the same to the appellant, at its office in New York, from July, 1872, till Gottshelf's death in 1878.

Knoefel, the agent of the company, says that he has no recollection of any such interviews or conversations had with the appellees as they detail, but he even fails to recollect that any written permits were obtained, and it is evident from the entire proof that the appellees offered to pay the extra premiums and were informed by the agent that the company would not require any additional payment. It must be admitted that the appellees knew that it was necessary to obtain the consent of the company to the removal and continued residence of Gottshelf at Vicksburg, and that the agent had no power to modify or change the contract, but this case does not present the question as to the power of the agent to alter the legal rights of the parties, or to change the limitations placed upon the rights of the assured by the terms of the contract. This the agent had no power to do. The policy informed them the agent had no such power, and therefore the appellees continued to pay the premiums when they knew the policy, by its terms, was forfeited, on the assurance by the agent that the company would not require a greater sum. They concealed no fact from the agent, and having effected the insurance with him, confided in his statements and paid the premiums as he required, and doubtless would have continued to do so but for Gottshelf's death. In this case the agent received the premiums, with the understanding and agreement between himself and the assured, that this policy was to be binding on the company. They paid it upon no other conditions, and Knoefel, being the agent of the company *to receive premiums*, it was the duty of this general agent to have informed the company of what had transpired between the assured and himself. *The power to receive the premiums is expressly given the agent by the terms of the policy*, and if he received them after the act of removal had worked the forfeiture, what right had the company to receive the money? They did receive it from July, 1872, until September, 1878, a period of six years, and now insist upon the forfeiture, with the right to retain the premiums paid by the appellees. The company must either disclaim the act of the agent by returning the money thus improperly paid, or comply with the terms of its policy.

It has failed to do either, after a full knowledge of all the

facts, and, in our opinion, the judgment below was proper. The case of *Wing v. Harvey*, reported in De Gex and Gordon's reports, English Chancery, vol. 5, page 265, is very much like this. There the policy was void if the assured went beyond the limits of Europe without license from the company. Bennett, the assured, went to Canada and was informed by Lockwood, the agent, that the policy would be good if the premiums were regularly paid. They were paid for several years and transmitted to the home office. On the death of the assured, the company refusing to pay, it was held in the court of chancery that it was liable, even after the company had offered to repay the premiums, with interest, that had been paid after the assured left Europe. On the policy in that case was this indorsement: "If the party upon whose life the insurance is granted shall go beyond the limits of Europe, without the license of the directors, this policy shall become void, the insurance effected shall cease and the money paid to the society become forfeited to its use."

In the case of *Insurance Company v. Wolff*, reported in 5 Otto, the proof conduced to show that the agent was not even apprised of the fact that the assured had gone into forbidden territory, and as soon as the company ascertained that fact it directed a return of the premiums paid after the forfeiture, and while it is held in that case that the knowledge of the agent did not waive the forfeiture, it is evident, in the absence of convincing proof to the contrary, the court would have held, where the company had received the premium for years, the presumption must necessarily be indulged that it knew of the removal, and in accepting the premiums waived the forfeiture. We are not prepared to say that the proof in this case would not authorize such a conclusion, but it is sufficient to say that the appellant is in court insisting on its right to retain the premiums paid from 1872 to 1878, and by so doing it has ratified the acts of its agent. Considering, therefore, the facts on this branch of the case in the light presented by counsel for the appellant, the appellees are entitled to recover.

Judgment affirmed.

Wm. Reinecke for appellant.

P. B. Muir and Young & Trabue for appellees.

THORNBERRY'S ADM'R v. DILS.

(Filed April 18, 1882.)

1. *New promise made by bankrupt, after filing his petition but before receiving his discharge in bankruptcy, if made for a new consideration, is enforceable.*

2. *It is not essential that the consideration should be adequate in point of actual value. It is sufficient, however slight the benefit, if there be no incompetency to contract, and the agreement violates no rule of law.*

3. *Where relief is sought on the ground of fraud or mistake, inadequacy of consideration is a circumstance which should be considered.*

Appeal from Pike Circuit Court.

Opinion of the court by Judge Hargis.

The appellant's intestate, being indebted by note and account to the appellee, and in various ways to others, filed his petition in bankruptcy on the 16th day of March, 1868, and procured his discharge on the 8th day of June, 1871.

After the last-named date the appellee brought his action, in which he set forth the execution of the note and creation of the account, together with some small items of indebtedness, alleging that the intestate had, after he filed his petition in bankruptcy and before his discharge was granted, promised to pay to him all of said indebtedness, on the condition that appellee would pay his taxes for 1868, and that he had paid the taxes for that year, amounting to \$19.90.

The appellant controverted the allegations of the petition and pleaded the statute of limitation and his discharge in bankruptcy. The evidence sustained the averments of the petition and the court rendered judgment for the amount of appellee's claims, except one for \$150.60 that need not be noticed, as he does not complain.

The appellant's counsel insist that the discharge furnished a complete bar to the original debts, and that the new promise, if made, was not enforceable for want of consideration sufficient to uphold it.

In the case of *Ogden, &c. v. Redd*, 13 Bush, 582, this court held that the mere promise, made before a discharge had been obtained, to pay a debt did not extinguish the obligation created by the original contract, and there being no consideration, therefore, to sustain the new promise, it could not be enforced.

But this case presents a consideration in addition to the new promise. Whether the additional consideration, being only

\$19.90, is sufficient to give vitality to the new promise, which would otherwise be a naked promise, is the question.

Had the primary contracts been discharged by the bankruptcy or surrendered in consideration of the new promise, the moral obligation to pay the debts would have supported the promise.

But neither of these things was done, yet the moral obligation to pay remains, and it will have an existence so long as the debts are unsatisfied by payment or its equivalent, notwithstanding the remedy may be suspended or entirely gone. Hence when the new promise was made there existed a moral obligation on the part of appellant's intestate to pay, and by the agreement of the parties a valuable consideration was also added to it.

Thus a new and completed contract was made, which embraces every element necessary to constitute a legal undertaking, and the inadequacy of the valuable consideration can not affect it.

It is not essential that the consideration should be adequate in point of actual value. It is sufficient, however slight the benefit, if there be no incompetency to contract, and the agreement violates no rule of law.

The parties should be allowed to judge of the benefits to be drawn from their agreements, and the free exercise of their judgment and facility in contracting are necessities to this end and should not be interfered with.

Where relief is sought on the ground of fraud or mistake, inadequacy or inequality of consideration, is a circumstance which should be considered. But there is no intimation here that the new promise was attended by any circumstances of oppression or procured by fraud. In fact it appears that the decedent approached the appellee first, and asked him to agree to the terms of the new promise, which the latter declined at the beginning of the interview but afterwards, being pressed to do so, assented to it and paid the taxes according to the agreement, and it must be upheld.

Judgment affirmed.

Thos. R. Brown and W. M. Connelly for appellants.

MURPHY, &C., v. COCHRAN'S TRUSTEE, &C.

(Filed April 18, 1882)

1. *In action, on return of no property to subject property specifically described, no attachment levy is necessary to give a lien as against the defendant in the action.*

An equitable lien is created, by filing the petition and service of the summons.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Hines.

In an action on the return of no property, when the proceeding is to subject property specifically described, no attachment levy is necessary to give a lien as against the defendant in the action. The lien is an incident to such a proceeding in equity and independent of the Code. Section 442 of the Code was not intended to interfere with such liens, but to enlarge the power of a court of equity in the subjection of property to the satisfaction of an ascertained debt, where a proceeding for discovery is necessary. In such case a general attachment may be issued, the levy of which will create a lien, or a lien may be created by the service of a summons, with the object of the action endorsed thereon, on the person holding or controlling the defendant's property. *Menderson, &c., v. Specker, &c.*, MS. opinion, October 8, 1881. In this case the main object of the action being to subject the property in controversy, and it being sufficiently described in order to identification, an equitable lien was created as against the debtor by the filing of the petition and the service of summons. 3 Sumner.

The court below, however, erred in refusing to allow D. I. Murphy to file his petition, claiming the property. By the provisions of section 29 of the Civil Code this is authorized to be done at any time before the disposition of the proceeds of the property against which the lien is asserted.

The summons served upon D. I. Murphy only required him to answer as a garnishee. The object of the suit was not endorsed upon the summons, and he can not, therefore, be held to know the object of the suit and to be estopped by reason of delay in filing his petition, laying claim to the property. For this error the cause must be sent back, with directions to al-

low D. I. Murphy to file his petition and litigate his claim to the tobacco.

W. W. Tice for appellants.

BICKEL V. JUDAH.

(Filed April 21, 1882.)

1. *Purchaser of real estate at decretal sale, by accepting from the debtor payment in full of his debt, interest and costs, elects to restore what he has purchased.*

2. *Where the purchaser elects to take the money for which the judgment was rendered, and under which the purchase was made, a court of equity will divest him of the title.*

3. *By paying taxes the purchaser acquired a lien therefor, the same the city and State had, and nothing more.*

4. *When a surety pays or is compelled to pay the debt, he is entitled to be substituted to all the rights, securities and remedies of the creditor.*

In this case the plaintiff purchased the real estate, and obtained leave of the court to pay and have taxes against the property credited on his bond. The taxes exceeding the amount of his bid, he brought suit on a supersedeas bond executed by the debtor, and recovered the full amount of his debt, interest and costs of the surety in the supersedeas bond.

Held, That the purchaser elected to surrender the benefit of his purchase, and has a prior lien only for the taxes paid by him, whilst the surety has a lien for the amount paid by him.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

This case has been heretofore fully considered, but the zeal and learning manifested by counsel for the appellee in his petition for a rehearing necessitates further investigation. As counsel seems to labor under the impression that the court has inadvertently fallen into some material errors of fact in the examination of this record, it may be proper to present the facts upon which, or the substance upon which, the opinion already delivered was based.

The appellee, Judah, held a claim against Reamer, evidenced by note and mortgage. The property mortgaged was sold at the instance of the appellee Judah for the payment of his debt, and it was several times purchased by either Reamer or his friends, and by reason of their failure to execute bonds, or for other causes, they failed to comply with the terms of sale, and

finally the mortgaged property was again sold, and Judah, the appellee, became the purchaser at the price of six hundred dollars. The report of sale was properly made, laid over for exception, and, none being filed, was confirmed on the 12th of July, 1878, and by this order of confirmation leave was given the plaintiff Judah "*to pay the State and city taxes due on said property, and to have credit on his purchase bonds therefor.*" No objection or exceptions was made or taken to this order. In the original action of Judah against Reamer there was a personal judgment against Reamer, and a foreclosure of the mortgage, and Reamer having purchased the property and failing to give bond, was proceeded against for contempt, and thereupon superceded the judgment and brought the case to this court, the appellant, Bickel, becoming his surety on the supersedeas bond. The action or judgment of the court below was affirmed by this court, and on filing the mandate the property was again sold (Reamer failing to comply with his purchase), and the appellant became the purchaser at the price of six hundred dollars, which sale was confirmed and all the proceedings under it as already stated.

Judah finding, as he alleges, and the fact is doubtless true, that the taxes due and constituting a lien on the property purchased, amounting to more than his bid of six hundred dollars, instituted his action against Reamer and Bickel, his surety, on the supersedeas bond, alleging in express terms that the taxes exceeded the amount of his bid; that his debt was unpaid; and asked judgment against Bickel for the amount of the debt, including interest, damages, and costs incurred in this court as well as the court below. In that petition was alleged the fact of Judah's purchase, the confirmation of the sale, and that the taxes due on the property, city and State, were \$633, which, if credited on the bond of *plaintiff* Judah, would leave the entire amount of his debt, interest and costs unpaid. To this petition the appellant, Bickel, made no denial, and could not have well controverted the statements, as they are each and all verified by the record. Judgment was obtained against Bickel, the surety, for the entire debt, interest, costs, &c., and was paid by him in August, 1879. After this was done the appellant, Bickel, filed an amended pleading, setting up the fact that he had paid the

debt, and asking to foreclose this mortgage for his own benefit, alleging that the plaintiff, Judah, claims some interest in the property. Judah replied to this, setting up his title in the manner recited, and that reply has not been controverted.

Reamer and wife, in March, 1880, instituted the present action, the object of which was to attack the deed made by the commissioner to Judah on the confirmation of the report of sale in the original proceeding. A demurrer was interposed to this petition and sustained, and the petition dismissed, and that judgment was affirmed by this court. Reamer and wife had made Bickel a defendant to the last suit, and Bickel, appearing in court, filed his answer and cross-petition against Judah, in which he insists that he is entitled to all the benefits arising from the mortgage to Judah, and by leave of court amended his cross-petition, alleging that "the purchase price, bid by defendant Judah for the undivided one-third of the property, was \$600; but there are taxes claimed as due, which Judah contends he has a right to pay off, but he has paid no taxes whatever, but had leave of court to pay the same," &c.

A demurrer was sustained to the cross-petition of Bickel, he having made all the previous proceedings in the case part of that pleading, and, failing to plead further, his action was dismissed, and of that judgment he complains.

We are met with several objections urged by way of interrogatory to the reason given for the reversal in this case. We are asked to suppose a stranger to the action had purchased the property for \$600; would the payment by Bickel of the debt to Judah have authorized the latter to be substituted to the rights of the purchaser? The response to the inquiry must be in the negative. The sale and confirmation would vest in such a purchaser an absolute title. If Reamer and wife can not maintain the action to attack this final judgment, resulting in the sale to Judah, where are the facts in this record authorizing Bickel to maintain such an action? 2nd. It is clear that Reamer and wife could not maintain the action because they had not paid one cent of the judgment against them, and the surety, Bickel, was in court asking to be substituted to the rights of Judah. Suppose, however, after this sale and its confirmation Judah had demanded of Reamer and wife the payment in full of this debt,

interest and costs, and payment had been made, and then Reamer and wife had said to Judah, we will pay the taxes on the property sold, that you were, by the order of confirmation, allowed to pay, or if you have already paid them, we tender you the money and ask a reconveyance, would a court of equity, upon the refusal of Judah, have hesitated for a moment to compel a restoration of the property? There is a manifest difference between a stranger making the purchase and the plaintiff in the action, who is the creditor in a case like this. The debtor may pay off the debt in full to the creditor, and still the stranger who buys holds the property, and his title is in no manner affected, but when the creditor, who is the plaintiff and purchaser also, after his purchase and confirmation, accepts from the debtor payment in full of his debt, interest and costs, it is an election on his part to restore what he has purchased. It would be a singular rule of equity that would sanction such a proceeding, and the conscience of the chancellor would trouble him in the effort even to consider favorably such a proposition.

The chancellor is only asked in this case by the surety to compel the creditor, who has been fully paid, to restore that which has been obtained by the latter under a judgment that this surety has been compelled to pay at the instance of the creditor. If paid by the debtor the right to restoration will apply, whether the property sold was subject to redemption or not. The rights of a plaintiff who purchases is as sacred as that of a stranger, but he may elect to take the money for which the judgment was rendered and under which the purchase was made, and when this is done a court of equity will divest him of the title. In this case he was allowed to remove the lien on the property for the taxes due, and when he obtained his whole debt from the surety, or if paid by the debtor, the lien for taxes only exists upon it in favor of the State and city, and if paid by the appellee, the purchaser, he has the same liens the city and State had, and nothing more.

In this case, however, the surety who paid the debt is entitled to be substituted to all the rights of the creditor. He is not asking to modify or vacate the judgment, but is in fact ask-

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ing that the judgment be maintained to enable him to obtain the benefits resulting from it. But it is argued that the surety was sued by Judah, and in that action the latter set forth the order of confirmation, *allowing him to pay the taxes*, and that they amounted to a larger sum than his bid for the property, and further, that the sale was not only confirmed, but a deed made and, therefore, you (the surety) are estopped from setting up any claim by way of substitution or otherwise; that Bickel admitted everything alleged in Judah's petition is conceded, and that upon this admission or failure to deny a judgment was rendered against him for \$2,500, the full amount of the debt, interest and costs, which he has since paid.

This he was compelled to do because the facts alleged by Judah were true, and the latter, although the purchaser of the property, had not received one dollar of his debt. Bickel, the surety, had no cause of action, either against Reamer or Judah until he paid this debt, unless against his principal for indemnity. When the surety has paid the debt in full, and as Judah in his action against him alleged that he was permitted to pay the taxes without even an allegation that he had paid them, why should not the surety be allowed to pay the taxes and take the property, or if Judah has paid them, why should he not be allowed to refund the taxes, with the interest, and take the property or subject it to the payment of his debt? It is true in the action on the supersedeas bond the appellant might have tendered the money and demanded the right of subrogation, but this he was not compelled to do, and after satisfying the debt he had the equitable right to avail himself of any security in the hands of the creditor to indemnify himself against loss.

The appellee says that he received nothing; if not, he can lose nothing. He has his debt, interest and costs, and what more is he entitled to receive, either in a court of law or equity? The creditor, who is the plaintiff in the action, and becomes the purchaser under his judgment of the land of his debtor, and who afterwards recovers the full amount of his debt, elects to restore what he has purchased to his debtor, and what in fact is in equity, by reason of the payment the property of the debtor. Besides, in regard to sureties, it is a well-settled rule

that when "a surety satisfies the debt for which he is liable, he is entitled to have from the creditor, whose debt he pays, the securities which such creditor has obtained from the debtor, and if such securities are not voluntarily given up, it is the right of the surety to come to the court to have such securities delivered." Brandt on Suretyship, sec. 263. "As soon as the surety has paid the debt an equity arises in his favor to have all the securities, original and collateral, which the creditor holds against the person or property of the principal debtor, transferred to himself, and to avail himself of them as fully as the creditor could have done for the purpose of obtaining indemnity, he is considered at once subrogated to all the *rights, remedies* and securities of the creditor, and entitled to enforce all the liens, priorities and means of payment as against the principal, and to have the benefit even of securities that were given without his knowledge."

White v. Tudor, leading cases in Eq., vol. 1, page 136, notes to *Denny v. Earl of Winchelsea*. It is the right of the surety to stand in place of the creditor in all cases; this is the general rule. De Colyar on Prin. and Surety, page 331, note.

"There are many cases in which a surety paying the debt will be entitled to stand in the place of the creditor, or to obtain the full benefit of all the proceedings of the creditor against the principal. Story's Equity Jurisprudence, vol. 1, page 541. The surety in this case is not seeking to disturb the judgment, but to avail himself of all the rights the creditor has obtained under it by reason of his (the surety) having paid in full the debt due the creditor. We have seen that the debtor himself, upon paying the debt to his creditor, would have been entitled to a restoration of his land upon the payment of the taxes, either to the tax gatherer or to the creditor, if he had paid them, and, if so, it is plain the surety must have the relief sought. This relief is based not only on the principle of natural justice, but is that character of remedial justice the chancellor should delight in administering.

This judgment must be reversed and the cause remanded, with directions to require the appellee, Judah, to surrender the property purchased, that it may be sold to satisfy the debt paid by this surety, first paying the taxes, if any, due on the

property that may have been paid by Judah. The original opinion is to this extent modified, and the opinion now delivered substituted therefor. This mandate is based on the controverted record before us, the demurrer presenting the question arising upon the whole case.

If any fact has transpired outside the record, showing that the surety has been indemnified or not entitled to the relief, then the overruling of the demurrer should not preclude such defense.

The reason the facts of the record are determined is, that the case has been fully argued on both sides and the entire question presented by the demurrer, and assuming the facts as they now appear and are stated by the appellee, the appellant is entitled to recover.

Barret & Brown for appellant.

Russell & Helm for appellee.

BRADLEY, &C. v. SKILMAN, &C.

(Filed April 21, 1882.)

1. *Legislative authority to an infant*, authorizing him to execute a compromise settlement under, and construction of, his father's will, and the compromise had no effect upon the rights of the children of such infant who were not parties to the compromise.

2. *Devise to a son "and his heirs or children, should he have any, forever, but should my son die without heirs, then to the sons of D.," &c., created an absolute estate in the first taker*, subject to the defeated upon his dying without children, and his children took by descent or devise from him, and not as purchasers under the will of their grandfather.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Pryor.

John Bradley died in the county of Bourbon many years since, leaving a last will and testament and several children surviving him. He owned at his death a large tract of land lying mainly in the county of Montgomery. By the provisions of the will his youngest son, Shelton Bradley, seems to have been devised the bulk of his estate. This son was, at the death of his father, about sixteen years of age, and the other children, being dissatisfied with the devise made to Shelton, were about

to contest the validity of the will upon the ground of a want of capacity on the part of their father to execute such a paper.

A compromise was effected between the children, and the rights of Shelton, acquired by the provisions of the will, were surrendered and his interest in the estate regulated by the compromise. As he was under age at the time of this settlement the Legislature, at the instance of all the parties, passed an act empowering Shelton to consummate the agreement with reference to the estate, and this was subsequently carried into effect by the parties. Whatever may have been enacted by the Legislature with reference to the title of Shelton under his father's will, the power to construe that instrument is with the courts alone, and no interpretation or construction given by the law-making power or by the parties in interest can affect the rights of those who were not parties to the settlement, and who in no manner sought legislative advice, and therefore this branch of the case requires no further consideration.

Shelton, the principal devisee, died shortly before the institution of the present action, and his children, who were the plaintiffs below and appellants here, claim that they were the devisees in remainder of all the land devised to their father, and at his death were entitled to the possession. The rights of the parties must depend upon a proper construction of the will of John Bradley. The clause of the will under which the children of Shelton Bradley claim this land is as follows:

"I give and bequeath to my son Shelton all the residue of my property, after paying my debts and the foregoing legacies, *to him and his heirs or children, should he have any, forever*; but should my son Shelton die without *heirs*, then the residue of my estate that may come into his possession, agreeable to this my will, is to be equally divided between the sons of Daniel S. Bradley and the sons of Hiram Bradley and William Bradley's daughter and Mary, the daughter of Walter Bradley, deceased, the said last-named Mary to have two portions or moieties." This contingent devise is to the grandchildren of the testator. Shelton married after his father's death and died in 1854. His children maintain that under the clause of the will referred to their father took a life estate, and they were the

owners in remainder. The appellees insist that their father took a defeasible fee, and, having children, the latter took by descent from their father, and not as purchasers, under the will of their grandfather.

It is plain, we think, from the clause of the will in question, that no express devise is made to the children of Shelton Bradley, and whether, from the language used, it arises from a necessary implication is the issue here. While it must be conceded that the word *children* is to be generally considered as a word of *purchase* and not of limitation, still this will, like all others, must be so construed as to arrive at the intention of the testator and the meaning he attached to the language used, and, in order to ascertain this meaning, a consideration of the entire will becomes necessary. Although counsel for the appellees differ somewhat as to the construction of this will, it seems to us if the word *children* was used as a term *purchase*, these appellants, as they came into being, took a vested estate in remainder, and must be regarded as the owners of the land in controversy.

It is certain from the provisions of the will that Shelton Bradley was the favorite child and that his father's purpose was to give him the greater part of his estate, to the exclusion of his other children. That he knew how to create a life estate and to fully secure the children of his children, by vesting in them a remainder interest, in express terms, is plain from the devises made to some of his other children. In the devise made to Hiram Bradley he says: "I give and bequeath unto my son Hiram, *during his natural life*, and after his death to descend to *his lawful children*, certain land, &c." In making a provision for his daughter the testator, after designating certain trustees, gives to this daughter the annual rents of certain land *during her natural life*, and after her death the rents to go to her children, and when the youngest becomes of age the land to be sold and the proceeds to be divided *among her children*.

If then it was the purpose of the devisor to create a life estate in this son, with remainder to his children, he would have used language free from ambiguity, and left this devise as he did the devises made to his other children, free from any doubtful meaning. It may be argued that the fact of his hav-

ing made the devises to his other children for life, would indicate an intention to limit the devise to his son Shelton in the same manner. We think not. First, because the language used implied a different purpose; and, second, his object seems to have been to give to this son the greater part of his estate, and to make a manifest distinction, for some reason, in the devises, both as to the quantity and duration of the estates given to his children.

His son Shelton, at the time the will was executed, being under age and without children, the thought doubtless suggested itself to the devisor that this son might die childless, and in that event some provision should be made as to the parties who would be entitled upon such a contingency.

The testator in that event selected the contingent devisees, and this was the limitation or restriction, and no other, placed upon the devise to this son. The devise is *to him and his heirs or children, should he have any, forever*. And if he dies without heirs, to go as the testator directs. His intention was to give the son an absolute estate, subject to be defeated upon his dying without children. The language shows clearly that the testator knew the word *heirs*, in its enlarged sense, would embrace all who could inherit from his son, and as he intended to designate those who should have the property in the event his son died childless, he explains what he means by the word *heirs*, that is, he uses it in a qualified sense by restricting its meaning to children. If my son dies *without heirs or children*, those who would take from him, and not under my will, then the estate is to go to certain of my grandchildren. The testator did not intend to vest the children of Shelton with any estate under the will, but the language used was for the purpose only of defining what he meant by the term *heirs*, and to fix the event on the happening of which the absolute estate was to cease.

If my son dies without children then my will is that my grandchildren shall take the property. If he leaves children they will take by descent from him and the estate devised goes in the direction I have given it, but, if without children, I have designated such of my grandchildren as shall be entitled to it.

This we are satisfied is the proper interpretation of the will of John Bradley, and by its provisions the appellants took the estate in controversy as heirs or devisees of their father, and not as purchasers under the will of their grandfather. The case of *Righter v. Forrester*, reported in 1st Bush, relied on by counsel for the appellants, is, we think, against them. In that case the devise was to *Amanda Jane Miller* (who married Forrester) *and her bodily heirs*, and this court, looking to the entire will to ascertain the intention of the testator, said: "In the devise to the testator's daughter of lands in Indiana, the express words are, conveyed to *them and their heirs forever, to do with as they please*, while in the second and fourth clauses of the will the words *bodily heirs* are used in reference to the land in Bourbon; and further, that by the devise 'to Mrs. Palmere of certain houses and lots, the devise is to *her forever to dispose of as she may think proper*, by reason of these provisions of that will.' " This court said that the words *bodily heirs* were employed to limit the title of Mrs. Forrester to an estate for life. So in the will before us the deviser had created in express terms, and in apt language, a life estate in the devises made to two of his children, and therefore it tends strongly to show that the language used in the devise to Shelton was not intended to create in him a life estate only.

In the case of *Carr and wife v. Estell*, 16 B. M., the devise was to *Mary Baker Didlake and her children*. This court held, although there were no children in *esse* at the execution of the will, that the children or child subsequently born took a vested remainder, the mother holding for life only. There was nothing on the face of the will showing a contrary intention, and the word *children* was given its general meaning, that is, *a word of purchase*.

In the case of *Webb & Harris v. Holmes*, 3 B. M., the conveyance was to Sarah Thomas, "to her and her children forever." It was adjudged the mother held a life estate and the children the remainder. Many cases might be cited giving conclusions reached as to the intention of the testator in making the particular will, all having some bearing on the questions before us, but at last the intention of the testator is to be gathered from his *own will*, and while cases somewhat

analogous throw light upon the subject, no express adjudication as to the intention of the testator in the one will will necessarily control the construction of another and different will. We find in the case of *Line v. Nichols*, 2 Dana, where a conveyance was made to *T. Sullivan and her bodily heirs*, it was held that the words bodily heirs did not mean children, and that T. Sullivan took the fee.

In the case of *Moran v. Dillehay*, reported in 8 Bush, this court held the word *children* to have been used in the sense of heirs, and as a word of inheritance and not of purchase. This construction was arrived at by considering the whole will in order to arrive at the intent of the testator. In the present case the word children was used as descriptive only, or rather as restrictive of the meaning of the word heirs, confining it to children only, and not giving to that word its comprehensive or general legal meaning.

In the case of *Lockland's heirs v. Downing's ex'ors*, 11 B. M., the devise was "all the residue of my estate, whether real, personal or mixed, not otherwise disposed of, I desire may be equally divided, after my death, between my brother, John Downing, my two sisters, Elizabeth Cannon and Nancy Gibson, and the children of sister Nelly Lockland, *to them and their children forever*, it being my desire that the portions allotted to my brother John and my two sisters and the children of my deceased sister, Nelly Lockland, shall be made as nearly equal as possible in kind and amount." In this case the words *children forever* were determined to be words of inheritance and not of purchase, the entire will showing that such was the intention of the testator. So we think a like interest is shown upon the face of this will in the devise *Shelton and his heirs or children, should he have any, forever, but should my son Shelton die without heirs*, then to my grandchildren. The devisor clearly intending to give to the son a fee in the estate devised subject to be defeated upon his dying without children. The judgment of the court below dismissing the petitions is therefore affirmed. Judge Hargis not sitting.

Tyler & Hazelrigg and Wm. Lindsay for appellants.

Peters & Brock, Reid & Stone and A. Duvall for appellees.

BUSH *v.* COMMONWEALTH.*(Filed April 21, 1882.)*

1. *A negro convicted of murder was not deprived of his equal rights in this case, in which "the grand jury which returned the indictment against him, and the trial jury which returned the verdict against him, were composed exclusively of white persons."*

2. *An inspection of the petition to remove a criminal prosecution from a State to a Federal Court "is essential to determine whether it contained allegations sufficient to authorize a transfer, and in its absence it must be presumed that it was defective in the allegation of jurisdictional facts, and that the court below did right to disregard it."*

3. *Petition to transfer from State to Federal Court offered to be filed after verdict and sentence, after motion for new trial had been overruled, did not operate so as to transfer the case to the Federal Court.*

4. *Witness offered to prove what a deceased witness testified on a former trial, must remember the substance of all the deceased witness testified to, otherwise he is not competent.*

If the witness states that he remembers the substance of all the deceased witness testified to, and it is manifested on his examination that he does not so remember, his evidence should be rejected.

Apparent or actual contradictions in the testimony of witnesses, who purport to relate the substance of the evidence given by a deceased witness, go not to the admissibility of the testimony, but only to its weight with the jury.

5. *Religious belief or disbelief does not qualify or disqualify a witness to testify in a civil or criminal case in this State.*

6. *An atheist is a competent witness in civil and criminal cases in this State.*

The Constitution changes the common law rule, by which atheists were made incompetent as witnesses, and makes competent as witnesses all persons, so far as any religious test is concerned.

See in opinion a full statement and discussion of these questions.

7. *Sentence was not pronounced too soon, the conviction being on the 5th and the sentence on the 7th day of the term.*

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Hines.

This is an appeal from a conviction and sentence of death on an indictment charging murder. On a former appeal from a like sentence the case was reversed because of improper instructions. 78 Kentucky, 268. On this appeal the complaint is:

First, that the court below had no jurisdiction to try the cause, because it had been transferred to the Circuit Court of the United States.

Second, that the instructions given in the case did not conform to the law as laid down by this court on the former appeal.

Third, that improper testimony was allowed to be considered by the jury; and,

Fourth, that sufficient time was not allowed to intervene between the verdict and the sentence.

Upon the first point it is insisted for appellant that, being a negro, he was deprived of equal civil rights in that the grand jury which returned the indictment against him, and the trial jury which returned the verdict against him, were composed exclusively of white persons, and that persons of his own race and color were excluded from the juries on account of their race and color. It is claimed that a petition embracing these allegations was filed before the final disposition of the case, as required by section 641 of the Revised Statutes of the United States, and that by virtue thereof the jurisdiction to try and determine the case passed to the United States Circuit Court. The record does not show this to be true. There is an affidavit by appellant that such a petition was filed, but a copy of the petition is not exhibited. An inspection of the petition is essential to determine whether it contained allegations sufficient to authorize a transfer, and, in its absence, it must be presumed that it was defective in the allegation of jurisdictional facts, and, therefore, that the court below did right to disregard it. It is insisted further, that if the record does not show that there was a transfer of the case by the filing of the petition, as stated in the affidavit, that the case was transferred by a petition exhibited in the record and which was offered to be filed after the verdict and sentence, and after a motion for a new trial had been overruled. If it be conceded that this petition states facts sufficient to give the Federal Court jurisdiction, it is clear that it comes too late. It is provided in the statute that the petition must be filed before "the trial or final hearing of the cause," and a petition filed after verdict and sentence is manifestly too late.

As to the instructions, it is only necessary to say that they substantially conform to the law laid down on the former ap-

peal, and could not have misled the jury from the real issue presented for their consideration.

The objection to certain testimony allowed by the court to go to the jury presents two questions:

First, when a witness is offered to prove what a deceased person testified to on a former trial of the same cause, what is the test, and by whom applied, to determine the question of admissibility of the witness to testify and of the competency of the evidence when heard?

Second, does the want of religious belief incapacitate a witness, and can that belief be inquired into in any way?

Upon the first sub-division the law is, that when the witness states, as in this instance, that he remembers the substance of all the deceased witness testified to, both on the direct and on the cross-examination, he is a competent witness, and, when the evidence is heard, if it does not clearly appear that the witness does not remember the substance of all that the deceased person testified to, the evidence should be permitted to go to the jury, but if it be manifest to the court that he does not so remember, the evidence should be rejected. The testimony of each witness who undertakes to detail the evidence of a deceased witness must be tested by the same rule, and, if found admissible, must stand by itself, and consequently apparent or actual contradictions in the testimony of witnesses who purport to relate the substance of the evidence given by a deceased witness goes not to the admissibility of the testimony, but only to its weight with the jury. Nor is it every incidental or immaterial matter, in reference to which the memory of the witness appears to be at fault, that will authorize the court to exclude the whole. If the statement appears on its face to cover the substance of what the deceased witness testified to in reference to the material matters in issue, the evidence should be allowed to go to the jury for their consideration. Where the witness states that he heard the whole of the testimony of the deceased witness, and that he remembers the substance thereof, the court will not be justified in taking it from the jury unless, from the statement of the witness himself, it obviously appears that he does not remember the substance of what the deceased witness

testified to in reference to the material issues being considered. Applying these tests we see no reason to question the correctness of the rulings of the lower court in admitting the testimony of the two jurors who purport to give the testimony of the deceased witness who testified on the former trial.

The question embracing the second sub-division is novel, if not more serious, and difficult of determination. The question arises on this state of fact: The Commonwealth offered C. C. Moore as witness, and objection to his being sworn was made by counsel for the accused, who stated that he could prove that Moore was an atheist, did not believe in any God or future state of rewards and punishments, or in any state of accountability hereafter. The objection was overruled by the court, and the witness, being interrogated, stated that he believed it was morally wrong to tell a lie, and that he recognized the obligation of his oath in every sense of the word.

It is admitted that the modern common law requires, as a condition precedent to the admission of the testimony of a witness, that he believe in a Supreme Being who will punish, either here or hereafter, one who swears falsely, that the objection should be made before he is sworn, and that the alleged disbelief should be established by the testimony of such persons as may have heard the proposed witness declare his opinion on these matters, and not by the examination of the witness himself. In the time of Lord Coke it was held that no one but a Christian was a competent witness, but this rule was modified until belief in the existence of a Supreme Being, who will punish false swearing either in this life or in the life to come, is held sufficient. Now by statute in England, and in most of the States of the United States, either by statute, or by reason of constitutional provisions, religious disbelief does not disqualify. The unquestioned tendency of modern legislation, as well as of judicial interpretation, is to the exclusion of inquiry into religious belief as a test of the competency of a witness. In this State legislation, in civil cases at least, has kept pace with this tendency, so that by virtue of the provisions of the Civil Code no religious test can be applied. Under that Code every person subject to certain exceptions, of which this is not one, is competent to testify, unless he be found by the court incapable of

understanding the facts concerning which his testimony is offered, and where the witness is conscientiously opposed to taking an oath, he may affirm. Secs. 605 and 680 of Civil Code. In the Criminal Code, however, there are no such provisions, and, therefore, in the administration of the criminal and the penal law the rules of evidence recognized at common law are still in force, unless changed or abrogated by the organic law, as expressed in the Constitution. Upon the point under consideration we are of the opinion that the Constitution changes the common-law rule and makes competent as witnesses all persons so far as any religious test is concerned. The fifth and sixth sections of the Bill of Rights, when considered together, seem to cover the exact case under consideration. The fifth section declares the natural and inalienable right of all men to worship God according to the dictates of their own consciences; that no one shall be compelled to attend, erect, or support any place of worship, or to maintain any ministry; that the rights of conscience shall not be interfered with, and that no preference shall ever be given by law to any religious societies or modes of worship. The object of this provision was to make the divorce between church and State irrevocable, to establish unequivocally that the province of government is to deal with the temporal relations and affairs of men, and in no case with matters spiritual, and that under no circumstances should any burden be placed upon any one or any penalty enforced on account of opinion in reference to religious or spiritual matters.

The sixth section is as follows:

"That the civil rights, privileges, or capacities of any citizen shall in nowise be diminished or enlarged on account of his religion."

The obvious meaning of this is that whatever civil rights, civil privileges, or civil capacities belong to, or are enjoyed by, the citizens generally shall not be taken from, or denied to, any citizen on account of his opinions in regard to religious matters. It is a declaration of an absolute equality which is violated when one class of citizens is held to have the civil capacity to testify in a court of justice because they entertain a certain opinion in regard to religion, while another class is denied to

possess that capacity because they do not conform to the prescribed belief. Free governments deal with the acts of the citizen and not with his thoughts. To proscribe or punish for religious or political opinions is of the essence of despotism. To apply the rule insisted upon would be to make a religious test which is contrary as well to the letter as to the spirit of the Constitution. If the test can be applied in this case it may be applied in any, for, independent of this provision of the Constitution, there is nothing to prevent the Legislature from passing any law they think proper proscribing a particular denominational standard of belief as a test of competency to give evidence. In that case any Christian denomination, being in the ascendancy in the Legislature, might pass a law depriving all other Christian denominations of the capacity to testify as witnesses, and on the other hand if it should ever happen that atheists or deists were in a like ascendancy in the Legislature, there would be nothing to prevent them from proscribing all Christians in the same way. And further, the enforcement of the rule contended for might present, as suggested by Judge Scott in Perry's case, 3 Gratton, a case in which one believing in the prescribed formula would be sentenced to death by an atheist circuit judge, the sentence and judgment affirmed by an atheist appellate court, and denied pardon by an atheist Governor, for in no case is any of the officers required to conform to any belief as a condition precedent to the holding of an office, and to the exercise of its functions. If such a case should occur in which a Christian man should suffer death, though innocent, because an atheist was denied the capacity to testify in his behalf, every citizen would denounce such a rule thus applied as absurdly unjust, oppressive, and in violation of the spirit of our institutions. Again, an atheist may testify in any case where property rights are in issue in a civil proceeding, and to deny the Commonwealth or the accused of the same testimony, where life or liberty is at stake, presents an anomaly that is repugnant to every sense of justice. The opinion in the Perry case above referred to reaches, in construing a similar provision in the Virginia Constitution, the conclusion at which we have arrived. We think that this provision of the Constitution not only permits persons to testify without regard to religious belief or

disbelief, but that it was intended to prevent any inquiry into that belief for the purpose of affecting credibility. It places the atheist in this regard on the same footing as any other witness, and leaves the question as to credibility to be inquired into in the same way.

We are of the opinion that the sentence was not pronounced too soon after the verdict. Verdict was rendered on the 5th day of the term, and on the 7th sentence was pronounced. Sec. 283 of the Criminal Code provides that sentence in a felony case shall not be pronounced until two days after the verdict is rendered, unless the court be about to adjourn for the term. There appears no reason why the construction applied in ordinary cases, which is to count the day on which the act is done, when the limitation runs from the act as in this case, and not from the day, should not be applied here. Besides there is nothing to indicate that further delay could in any way have been beneficial to appellant.

Judgment affirmed.

L. P. Tarlton and Z. F. Smith for appellant.

P. W. Hardin for appellee.

WADE BARTON, &C., v. JAMES A. BARTON, &C.

(Filed April 4, 1882)

1. *Without a judgment and return of "no property," on a legal demand or attachment, a creditor has no right to go into a court of equity to set aside an alleged fraudulent conveyance. (Vance v. Campbell, ante p. 448.)*

2. *But when the defendant makes an issue upon the charge of fraudulent transfer, in such a case, and tries out the cause without objection, by demurrer or otherwise, to the jurisdiction of the court, it will be too late to raise the question as to the necessity of a return of "no property," for the first time, in the Court of Appeals.*

3. *The court had jurisdiction without a return of "no property," in this case, to subject the proceeds of the land, which had been fraudulently disposed of by the debtor, by gift, such proceeds being held in trust for the benefit of the widow and children of such fraudulent donor.*

Appeal from Graves Circuit Court.

Opinion of the court by Judge Hines.

There having been no judgment at law and no return of "no property" and no attachment under any of the grounds author-

ized by the Code, appellees had no right to go into equity to set aside an alleged fraudulent conveyance in order to subject the property to their demand, if purely legal, as decided in *Vance v. Campbell*, MS opinion of 1882, but appellant having made an issue upon the charge of fraudulent transfer, and tried out the cause without objection, by demurrer or otherwise, to the exercise of jurisdiction by the court, it is now too late to raise the question of the necessity of a return of "no property." Appellees would have been bound by an adjudication adverse to them because they had invoked the jurisdiction, and appellant will likewise be estopped to raise the question because, by failing to object, he has consented to the exercise of the jurisdiction, and has, in fact, invoked it. He would not be allowed to rely for protection upon the decree if favorable, and to renounce it if unfavorable. This is unlike a case where the court has no jurisdiction of the subject-matter, for in such case no consent can give jurisdiction, but here the court had jurisdiction to adjudge whether a conveyance or transfer of property was fraudulent, provided certain steps had been taken, and a failure to raise the question as to whether such steps had been taken is akin to submission of the person to the jurisdiction, where there has been no service of process, which may in all cases be done when the subject-matter may otherwise be inquired of by the court.

We waive the question as to whether the circumstances of the gift of the land, when there was no conveyance, were such as to vest an equity in the donee so that a court of equity might have compelled a completion of the gift, for, in our opinion, the evidence shows an enforceable trust in the proceeds of the land, such as to give jurisdiction to a court of equity, independent of the requirement that there should be a return of "no property" or proceeding by attachment to authorize a court of equity to set aside a fraudulent conveyance.

The evidence establishes to our satisfaction that it was agreed between Ben Barton and appellant that if Ben would surrender the premises, with the improvements, that the proceeds of the land should belong to Ben and should be held by appellant for him.

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The facts that the deferred payments on the land were evidenced by notes made payable to appellant does not necessarily negative that conclusion because not inconsistent with it. If that is not sufficient to create an enforceable trust, the subsequent transactions are. After the death of Ben the evidence shows that appellant agreed, in consideration of being allowed to wind up the estate of Ben without administering, that he would account to the widow and children for the proceeds.

Appellant subsequently gave to the widow a written statement, in his own handwriting, in which the amount in his hands for the children is specified, and the widow testifies that this amount was the proceeds of the land. This sum appellant loaned out for the children, as stated by him in his correspondence with the widow. He repeatedly and expressly recognized that this specified sum, as proceeds of the land, belonged to the children, and that he held it in trust for them. Nothing remained to be done on his part to create himself trustee for the children. His refusal to pay it to the widow as guardian was not a renunciation of the trust, because he expressly places the refusal upon ground that the widow was not the proper person to control it, and that there was danger of the children losing it if it passed into the hands of others. He at no time asserts any claim to the money until the parties to whom he had loaned the greater part of it had failed. The gift, in this instance might well be supported on the ground of a valuable consideration, which was the surrender of the personal property and the privilege of winding up the estate, but this is not necessary to determine, as it was clearly a consummated or perfected gift, independent of consideration. There was a clear and explicit declaration, duly executed and intended to be binding upon himself as trustee. Perry on Trusts, sec. 96.

Such being the case, and the evidence showing that the transfer of the property by appellant to his daughters was made for the purpose of defeating this claim, the court properly adjudged these transfers, as against this claim, invalid.

Judgment affirmed.

W. W. Tice for appellants

W. M. Smith and E. W. Hines for appellees.

CITY OF COVINGTON v. VOSKOTTER.

(Filed April 6, 1882.)

1. *Limitation of six months bars actions against city of Covington to recover taxes, &c.*

"An act to amend the charter of the city of Covington," providing "that all actions to recover from said city the amount of any taxes or assessments which have been or may be illegally or erroneously collected, shall be prosecuted within six months after the cause of action arose, and not afterwards," is constitutional and valid.

Said statute bars such an action after six months from the date of payment, no matter when the discovery that it was illegal or erroneous was made, and applies to every case where the citizen has paid taxes which the city had no right to exact.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Hines.

The only question we need consider is, whether the demurrer was properly sustained to the plea of the statute of limitations.

It is contended for appellee, first, that the plea is not sufficient in form because the statute is a private statute and is not referred to by its title and by designation of the day on which it became a law, as required by section 119 of the Civil Code. It is not a private statute within the meaning of the Code, but a public statute of local application. It has reference to the regulation or exercise of a high prerogative governmental function, and, so far as its character is concerned, is as general as if it extended in operation over the whole of the State, the only distinction being the limit of the territory over which it operates.

It is contended, in the second place, that the statute is unconstitutional, because it is not sufficiently designated and embraced in the title to the act in which it is found. The act is entitled "An act to amend the charter of the city of Covington." The law has reference to the operation and efficiency of the city government, and is as appropriately under that title as if it were a provision authorizing taxation for municipal purposes and prescribing a method for collection. It is clearly not unconstitutional on this or any other ground suggested. *Phillips v. Covington & Cincinnati Bridge Co.*, 2 Met.

The statute referred to reads as follows:

"That all actions to recover from said city the amount of any

taxes or assessments which have been or may be illegally or erroneously collected, shall be prosecuted within six months after the cause of action arose, and not afterwards; but this act shall not apply to causes of action now existing until the first day of February, '1875 "

It is admitted on the allegations of the pleadings that the taxes were levied upon and collected for agricultural lands that were not subject to taxation for municipal purposes; that they were fraudulently assessed and levied by appellant, because appellant knew at the time that the lands were not subject to assessment and levy; and that appellee did not discover that he was under no legal obligation to pay the same until within two months of the institution of this action. It is contended for appellee that the statute of limitations did not begin to run until the discovery of the fact that the assessment, levy and collection were without authority of law, but this is clearly not correct. If there was no authority to collect, the cause of action arose the instant the payment was made, and as the Legislature had the undoubted right to fix any arbitrary time within which the action should be brought, without regard to when the discovery of the right of action was made, there can be no doubt, from the language employed, that it was intended that no action should be brought after six months from the date of payment, no matter when the discovery may have been made. 3 Littell, 177.

The demurrer appears to have been sustained upon the ground that this statute is only applicable in cases where the property is within the taxing power and there has been irregularity in the levy, assessment or collection. This position appears clearly untenable. The words "illegally or erroneously collected" are broad enough and were evidently intended to cover every case where the citizen has paid taxes which the city had no right to exact; no matter whether the property is within the taxing power or whether the method pursued in collecting is unauthorized.

Judgment reversed and cause remanded, with directions to overrule the demurrer and for further proceedings.

Hallam & Perkins and M. L. Roberts for appellant.

Simmons & Schmidt and A. Duvall for appellee.

EVANS v. STONE, FOR, &C.

(Filed February 11, 1882.)

1. *Plea of no consideration* presents an issuable defense, to which a reply is necessary, in a suit on a note, bond or other like instrument.

2. *Facts constituting fraud, misrepresentation and covin* not necessary to be specifically averred.

An answer or plea to an action on a writing, "alleging generally that the writing sued on was obtained, or its execution procured, by fraud, misrepresentation and covin, without specifically averring the facts constituting the fraud, is sufficient, and presents a substantive and issuable fact, which is not a mere conclusion of law, and must be taken as true unless denied."

3. *Judgment non obstante veredicto*.

Defendants in this case were entitled to a judgment on the pleadings, notwithstanding the verdict against them, and notwithstanding the verdict was set aside on motion of the plaintiffs, pleadings amended, and a second verdict and judgment in their favor. On the appeal of the defendants that judgment is reversed, with directions to the lower court to render judgment in favor of the defendants, notwithstanding the verdict against them.

4. *Sec. 114 of the Civil Code, requiring parties to form an issue*, was intended to prevent frivolous issues, and to guard parties from going to trial upon no issue or immaterial issues, but it in no sense modifies or conflicts with section 386.

5. *Sec. 184, authorizing pleadings to be amended*, does not apply or authorize amendments after trial and verdict.

Appeal from Fayette Common Pleas Court.

Opinion of the court by Judge Hargis.

This was an action on a note by the appellees against the appellant and another.

The appellant answered and pleaded:

1st. That "the note sued on was executed without consideration."

2d. That "the execution of said note was obtained by fraud, misrepresentation and covin."

And in the 3d paragraph he stated the facts on which he relied to show the fraud and want of consideration.

On motion of appellees the third paragraph was stricken out and, without a reply having been filed to the other paragraphs, a trial was had which resulted in a verdict for them.

The appellant then moved for judgment, notwithstanding the verdict, to which appellees objected, and on the fifth day thereafter the court, at their instance, set aside the verdict, permitted them to file a reply, overruled appellant's motion and continued the case.

A subsequent trial terminated in a second verdict for the appellees.

The bills of exception present the history of each trial.

The solution of the question involved depends upon the sufficiency and nature of appellant's answer, and the object of § 386, Civil Code.

A plea which avers that a note, bond or other like instrument was given without any consideration, although it is in the negative, does not traverse the whole of the petition, and must be treated as pleading new matter not alleged in the petition and therefore presents an issuable defense, to which a reply is necessary to produce an issue.

Boone v. Shackleford, 4th Bibb, 67; *Ralston &c., v. Bulletts*, 3d Bibb, 264; *Coyle's Ex'x v. Fowler*, 3 J. J. M., 473.

An answer or plea to an action on such instruments, alleging generally that the writing sued on was obtained, or its execution procured, by fraud, misrepresentation and covin, without specifically averring the facts constituting the fraud, is sufficient, and presents a substantive and issuable fact, which is not a mere conclusion of law, and must be taken as true unless denied. *Ross, et al, v. Braydon*, 2 Dana, 161; *Sharp v. White*, 1 J. J. M., 107; *Whitehead, &c., v. Root, &c.*, 2d Met., 588.

The allegations of appellant's answer, although material and affirmative, stood undenied, no reply having been filed when the verdict was rendered, and, according to the rules of pleading, the appellant was entitled to the judgment because, if his pleas were true, they formed a complete bar to the action, and by failing to traverse them the appellees admitted their truth, and thereby left no issue of fact to be determined by the jury.

And section 386, Civil Code, provides that "judgment shall be given for the party whom the pleadings entitle thereto, though there may have been a verdict against him."

At the time the appellant made his motion for judgment, notwithstanding the verdict, the pleadings entitled him thereto, and this provision of the Code leaves no room for construction or discretion, and whatever may be the merits of this controversy, the parties, by their pleadings, having placed themselves within the condition contemplated by this section, must abide the consequences.

In the case of *Martendale, &c., v. Price*, 14th Ind., 118, the court, having under consideration a statute similar to sec. 386, *Ibid.*, said, "the statutory rule is that where, upon the statements in the pleadings, one party is entitled by law to a judgment in his favor, judgment shall be so rendered by the court, though a verdict has been found against such party."

It is argued, however, that section 114 of our Code makes it the duty of the court to compel the parties to form a material issue, and as no material issue was formed, there could be no trial and verdict, and therefore the court's action was legal.

A cursory reading of that section will show to an ordinary observer that the whole of its provisions relate to the proceedings *before trial* and not after trial and verdict.

It says, "parties must, *before trial*, form a material issue concerning each cause of controversy, and it is the duty of the court, upon or without motion, to compel them to do so."

This section, it seems to us, was intended not only to prevent frivolous issues and trials, but to guard parties from going to trial upon no issue or immaterial issues, but it in no sense modifies or conflicts with section 386.

It is urged that section 134, which authorizes the court to cause or permit a pleading or proceeding to be amended, was intended to modify said section, but we are convinced that such is not the case. It does not relate to the subject of setting aside verdicts or filing pleadings; it authorized amendments to pleadings already filed, and only when the amendment does not change substantially the *claim or defense*, can the pleading or proceedings be conformed by it to the facts proved.

This certainly does not apply to a case where the whole issue is sought to be formed after trial and verdict.

It is true that the court must, in every stage of an action, disregard any error or defect in the proceedings which does not affect the substantial rights of the adverse party, but overruling appellant's motion for judgment, when he was by law entitled to it, does affect his substantial rights and takes the case out of that clause of the section last mentioned.

We can not relieve the hardship of this case, and while the appellees' misfortune is deeply to be regretted, they were given every opportunity the law allows to join issues upon

the matters contained in the answer. They failed to do so or to furnish any excuse for their failure, and the fiat of the law must be obeyed.

Wherefore the judgment is reversed and cause remanded, with directions to render judgment in behalf of the appellant.

W. C. P. Breckinridge, J. R. Morton and Watts Parker for appellant.

D. G. Falconer for appellees.

ABSTRACTS OF DECISIONS NOT TO BE REPORTED.

MITCHELL'S ADM'R. & CO., v. RAY & CO.'S ASSIGNEE, No. 226.

Filed April 1, 1882.

Appeal from Hancock Circuit Court.

Opinion of the court by Judge Hargis, affirming.

1. "The opinion in No. 225, *Mitchell's Adm'r. & Co., v. Ray & Co.'s assignee* is applicable to this case which, for the reasons therein given on the question of clerical misprision, is affirmed."

MITCHELL'S ADM'R v. RAY & CO.'S ASSIGNEE, No. 225.

Filed April 1, 1882.

Appeal from Hancock Circuit Court.

Opinion of the court by Judge Hargis, reversing.

1. *Verbal promise to pay the debt of another and part payment thereof*, do not constitute a cause of action, the promise being verbal, and therefore within the statute of frauds.

2. *It was not necessary nor proper to make a motion to set aside or modify the judgment before taking this appeal*, because the judgment was not void, nor could it have been set aside or modified by the court after the term during which it was rendered. Section 763, Civil Code.

"*It was an erroneous judgment, but after the term had expired it would have been enforceable had the appellant failed to appeal.*"

W. S. Roberts for appellant.

BURNS v. STEPHENSON, & CO.

Filed April 1, 1882.

Opinion of the court by Chief Justice Lewis, affirming.

1. *On the second appeal in this case all the questions attempted to be raised are res adjudicata*, according to *Davis, & Co., v. McCorkle*, 14 Bush. 746.

R. C. Burns for appellant.

L. T. Moore for appellees.

WILLIAMSON v. MORTON & Co.

Filed April 1, 1882.

Appeal from Jefferson Common Pleas Court.

Opinion of the court by Judge Pryor, affirming.

1. *For goods purchased for the city of Louisville without authority of law, the purchaser is responsible to the seller, although the latter charged them against the city in the first instance.*

Kohn & Barker for appellant.

A. C. Rucker for appellees.

REYNOLDS v. STINNIT & WIFE.

Filed April 1, 1882.

Appeal from Larue Circuit Court.

Opinion of the court by Judge Pryor, reversing.

1. *Rescinding exchange of lands made by a married woman and her husband.*

Mrs. Stinnit and her husband exchanged her land with Reynolds for another tract of about the same value. In the trade Stinnit and wife executed their notes to Reynolds for certain sums, for which Reynolds retained a lien on the land conveyed by him to her. Reynolds took possession of the land conveyed to him and made valuable improvements upon it.

The lower court rescinded the contract upon the ground that Stinnit and wife were overreached in the trade, without allowing Reynolds anything for the improvements made by him. In reversing that judgment. *Held—*

That Mrs. Stinnit had the right to claim a rescission and pay for the improvements made by Reynolds, or to elect to keep the land conveyed to her by Reynolds, and have the notes executed by her cancelled so far as she was bound thereby.

Robertson & Smith for appellant.

J. W. Twyman for appellees.

DAVIS, MOODY & Co. v. WILEY.

Filed April 1, 1882.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Lewis, reversing.

1. *Defendant must demur, when, &c.*

When defendant has ground for demurrer to the petition, "on account of any defect, imperfection or omission, whether in substance or form, and permits the trial to be had and verdict rendered without demurring, he should not be heard in the Court of Appeals to object, if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict." (1 Chitty's Pl., 706.)

2. *In action on parol promise to pay the debt of another to the plaintiff, the plaintiff must allege the promise, to whom it was made, and by whom it was made, and a failure to so allege is a defect not cured by verdict.*

3. *To take the promise to pay the debt of another out of the statute of frauds, it is necessary that it be made not to the creditor but to the debtor, and it should be so distinctly alleged in the petition.*

In this case the petition does not state by or to whom the alleged promise was made.

Note. This case was affirmed October 25, 1881, see ante, p. 315. On petition a rehearing was granted and judgment of lower court reversed.

Russell & Helm for appellants.

Rodman & Brown for appellee.

BERRY v. BRANHAM, & CO.

Filed April 1, 1882.

Appeal from Lewis Circuit Court.

Opinion of the court by Judge Pryor, affirming.

1. *Jury should be instructed on questions of fact* that if they believe, from the testimony, that the plaintiff or defendant is entitled to recover, the verdict should be so rendered.

The better mode of presenting such an issue is not to tell the jury that they are the sole judges of the credibility of the witnesses, and that they must decide the case according to the weight of the evidence, which perhaps would be within the legal rule, but to leave the jury to determine whether a recovery should be had from the evidence, without attempting to define the extent of their belief or the mode in which they shall weigh the evidence.

The jury was instructed properly in this case as follows:

"The burden of proof is on the plaintiff, and if the jury believe from the testimony that the defendant assaulted, beat and bruised the plaintiff, as alleged in the petition, they will find the defendant guilty, and assess the damages at any sum in their discretion, not exceeding the amount claimed."

2. *Cumulative evidence alone being presented in the application for a new trial*, a new trial was properly refused.

Garland & Pugh for appellant.

E. F. Dulin and F. W. Mitchell for appellees.

PENCE v. COMMONWEALTH.

Filed April 1, 1882.

Appeal from Madison Circuit Court.

Opinion of the court by Chief Justice Lewis, reversing.

1. On indictment for selling liquor in violation of sec. 5, art. 3, chap. 92, General Statutes, it must be shown that the defendant was a merchant or tavern keeper.

Because there was no evidence showing or tending to show that the defendant was a merchant within the meaning, of sec. 2, art. 2, chap. 106, General Statutes, this case is reversed.

A person engaged in selling liquors alone should not be deemed a merchant within the meaning of said statutes.

J. W. Caperton for appellant.

P. W. Hardin for appellee.

MARSHALL v. SENOUR.

Filed April 1, 1882.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Hargis, affirming.

1. *Petition for new trial, on ground of newly discovered evidence*, was properly dismissed, the alleged newly discovered evidence being proof of admissions made by the successful party in reference to matters in reference to which both parties testified on the trial.

Such newly discovered evidence was merely cumulative and, therefore, insufficient to authorize a new trial.

R. D. Handy for appellant.

H. P. Stephens for appellee.

MONARCH v. DEAN, &c.

Filed April 1, 1882.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Hargis, reversing.

1. *Officer selling property of tenant under execution* is required, out of proceeds of sale, to pay the rent due or to become due for the year in which the levy is made.

2. *Lanlord has no lien on property sold to an innocent purchaser and removed from the premises.* (*Stone v. Bohon & Co.*, Kentucky Law Reporter for January, 1881.)

3. When the sheriff sold the horse in this case the title passed to the purchaser, and it became the sheriff's duty to pay the rent to the landlord. The landlord's lien could not be asserted against the purchaser's title to the horse, but he was entitled to the proceeds of the sale.

Williams & Powers for appellant.

J. A. Dean for appellees.

HERD, &c., v. EVERSOLE, &c.

Filed April 4, 1882.

Appeal from Owsley Circuit Court.

Opinion of the court by Judge Pryor.

1. Judgment enforcing mortgage given to secure three hundred dollars to the mortgagee is reversed in this case because the pleadings do not ask for the enforcement of the mortgage, and also because it appears that the three hundred dollars have been otherwise secured. On return of the case the parties are to have leave to amend their pleadings.

J. & J. W. Rodman for appellants.

J. L. Scott for appellees.

BLACKBURN v. MANN.

Filed April 6, 1882.

Appeal from Pendleton Chancery Court.

Opinion of the court by Judge Pryor, reversing.

1. *Personal judgment not prayed for*, no defense being made, was erroneous.

2. *Judgment enforcing lien was erroneous* in this case because the petition did not state the facts necessary to constitute the alleged lien.

It is averred that the notes are liens on a certain tract of land, but how the lien was created does not appear, there being no allegation that the plaintiff or his assignee sold the land, or that the lien was created by mortgage.

A. R. Clarke and L. T. Applegate for appellant.

T. C. Buckley for appellee.

PUTHUFF v. HOWE.

Filed April 6, 1882.

Appeal from Greenup Circuit Court.

Opinion of the court by Judge Pryor, reversing.

1. *Defective petition in action by assignee against assignor in this case alleged that in due time suit was instituted by the assignee on the note assigned and a judgment recovered, and in due time an execution was issued and returned no property found. Held—*

"What is due time is a question of law and the plaintiff should have alleged the facts to enable the court to determine what diligence had been exercised by the assignee in the effort to collect the note."

Roe & Roe for appellant.

F. H. Paynter for appellee.

BATES v. SCOBEE'S ASSIGNEE, &c.

Filed April 18, 1882.

Appeal from Shelby Circuit Court.

Opinion of the court by Judge Hargis, affirming.

1. *Right to assert a pre-existing debt against a homestead was waived by participating in the distribution of the proceeds under an agreement that the land should be sold, and the owner and his wife to take a certain sum out of the proceeds in lieu of homestead and the wife's contingent right of dower.*

Whilst the antecedent creditor was not a party to the agreement, he accepted its benefits and acquiesced in the arrangement for one year, and was thereby estopped to set up any claim to the homestead right of the husband or the dower interest of the wife in that part of the proceeds agreed to be given them in lieu of the homestead and dower rights in the land.

Bullock & Beckham for appellant.

L. A. Weakley and John C. Cooper for appellee.

TAYLOR'S ADM'R. &c., v. BRYAN.

Filed April 13, 1882.

Appeal from Todd Circuit Court.

Opinion of the court by Judge Hargis, affirming on original and reversing on cross appeal.

1. *Verbal vendor of unproductive land, repudiating the sale after payment of purchase money and the making of valuable and lasting improvements thereon by the vendee, is required to pay the purchase money and the value of the improvements to the vendee, with interest thereon from the date at which the vendor ousted the vendee.*

Ben. T. Perkins, jr., for appellants.

H. G. Petree for appellee.

REVILL &c., v. FRANKS' EX'R. &c.

Filed April 13, 1882.

Appeal from Owen Circuit Court.

Opinion of the court by Chief Justice Lewis, affirming.

1. *Construction of will of D. L. Simpson.*

Devise by testator to his wife, with the clause "in the event that my said wife shall marry or die, then it is my will and desire that my estate shall be equally divided between my children," created a vested remainder in the children and not a remainder contingent upon their dying before her marriage, or upon their surviving her, and upon the death of the children the estate passed by descent to their mother, with power to dispose of it by will. *Held that—*

"In our opinion the meaning of the words used in the third clause (the one quoted above) is the same as if the testator had said 'upon the death or marriage of my wife it is my will and desire that my estate shall go to my children.'"

"*In the event of*" is not synonymous with the word "if" in this case.

A. Duvall and Hallam & Gordon for appellant.

Warren Montfort and Joe Blackwell for appellee.

WELLES v. BISSELL, &c.

Filed April 13, 1882.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor, affirming.

1. *Mortgage of wife's land held as her general estate* by husband and wife to secure the payment of certain bonds, with coupons attached, was enforced in this case, and the land sold, and a good title thereto vested in the purchaser.

2. Amended petition correcting an error in the petition in giving the date of the bonds, in stating they were dated the 25th of May, when in fact they were dated the 24th: also giving a more minute description of the property sought to be sold, did not state a new cause of action, nor was it necessary that a summons should issue on such amended petition.

3. *Sale was not rendered void by a slight error* in the calculation as to the amount of all the indebtedness, to pay which the sale was made, when the sale failed to produce an amount sufficient to pay off the debts.

4. *Irregularities in the proceedings which would enable a nonresident to have the judgment vacated*, or a new trial, can not affect the rights of the purchaser at the sale.

Muir & Heyman and O. H. Strattan for appellant.

Goodloe, Roberts & Humphrey for appellees.

PERCIFULL, &c., v. WILSON'S HEIRS, &c.

Filed March 14, 1882.

Appeal from Meade Circuit Court.

Opinion of the court by Chief Justice Lewis, reversing.

1. *Where client contracts with two attorneys* to pay them as a fee an amount equal to one-fourth the value of the land, if recovered, but nothing if the suit is not gained, the withdrawal of one of the attorneys from the case prevents the other from enforcing the contract, he being entitled only to the reasonable value of his services.

The case is reversed because the allowance made the attorney who attended to the case is too small.

Chas. B. Fontaine for appellants.

Lewis & Fairleigh for appellees.

TABLET v. CORD.

Filed April 15, 1882.

Appeal from Fleming Circuit Court.

Opinion of the court by Judge Pryor, reversing.

1. *Personal judgment is held to be erroneous in this case because the demurrer to the original petition was undisposed of.*

2. *Appellant is required to pay the cost of copy of record of another case improperly copied in the transcript in this case.*

Wm. J. Hendrick for appellant.

W. H. Cord for appellee.

FAULDS v. DAVIS.

Filed April 15, 1882.

Appeal from Daviess Circuit Court.

Opinion of the court by Chief Justice Lewis, reversing.

1. *Settlement of partnership accounts in proceedings to which one partner was not a party was erroneous in this case.*

2. *Payment to one is equivalent to a payment to both partners.*

Owen & Ellis for appellant.

Sweeney & Son for appellee.

• SNAPE v. SANFORD'S RECEIVER.

Filed April 15, 1882.

Appeal from Owen Circuit Court.

Opinion of the court by Judge Pryor, reversing.

1. *Clerk of court is personally liable for money put in his hands, whether by order of court or not.*

But the sureties of the clerk were not liable in this case because the money was not put in the hands of the clerk by order of court.

J. A. Duncan, Green & Lindsay and Hallam & Gordon for appellant.

Geo. C. Drane for appellee.

WARFIELD, &C., v. GARDNER'S ADM'R.

Filed April 21, 1882.

Appeal from Hardin Circuit Court.

Response to petition for rehearing by Chief Justice Lewis.

1. *Affidavit and proof and demand must be made before commencing suit on a claim against a decedent's estate.*

2. *No demand is necessary before pleading as a counterclaim or set-off a claim against the estate of a decedent, whose personal representative is plaintiff in the action.*

But before pleading such a claim as a counterclaim or set-off the defendant must make the affidavit and proof as required by the statute.

Wilson & Hobson for appellants.

Montgomery & Poston for appellee.

DOWDY, &C., v. PRESTON BROS.

Filed April 27, 1882.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Hines, affirming.

1. *Refusal to continue the case on account of the illness of counsel* was not erroneous in this case as the pleadings were complete, and there is nothing in the record to indicate that the presence of counsel at the trial would have in any way been beneficial to appellants.

2. *Where a party, by his failure to reply, admits the facts alleged* he can not be injured by the court allowing to be read the depositions taken in the case prior to the time of his becoming a party, because no proof as against him was necessary.

3. *The suspicion that the appellant was an infant at the time of the rendition of the decree* is not cause for reversal. "It must clearly appear that there is incapacity, by reason of minority, before the decree should be disturbed."

The appellant in this case stated in his deposition, dated July 11, that he was twenty years of age. The decree was rendered on the 9th day of May, following.

Anderson, Brown & Stanfield for appellants.

Tice & Smith for appellees.

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KENTUCKY COURT OF APPEALS.

MEDLOCK, &c. v. SUTER, &c.

(Filed April 18, 1882—Not to be reported.)

Thirty years' continuous, adverse possession of land, under a parol purchase thereof from a married woman and her husband, bars an action to recover the same.

See original opinion in this case ante, 557.

Appeal from Owen Circuit Court.

Chief Justice Lewis delivered the following response to petition of appellants for a rehearing:

The widow and children of Tinsley M. Snelson, deceased, did not enter or claim under the purchase from the husband of Elizabeth Medlock merely, but they entered under a parol purchase by him, of both husband and wife, and held and claimed the land openly, continuously and adversely under that purchase for more than thirty years before this action was brought.

The right of action accrued to Elizabeth Medlock and her husband as soon as the widow and children entered under that purchase, claiming adversely, and the statute applicable to this case, as well as the opinion of this court in the case in 4 Bush, 432, construing it, is plain and unambiguous. The fact of Elizabeth Medlock being under the disability of coverture at the time the adverse holding by the widow and children of

T. M. Snelson began and her right of action accrued, did not prevent the statute running against her.

Even if it be admitted that G. C. Medlock, the husband, had only a life estate in the land, still the deed to the children of T. M. Snelson, made by him in 1845 after his wife's death, did not have the effect to change the character of the possession previously taken and then held by them, or to stop the running of the statute, for the deed was made in pursuance of the purchase made by T. M. Snelson before he died, and it was an acknowledgment of the payment by him of a part of the purchase price, and, besides, the deed did not purport to convey the life estate of G. C. Medlock merely, but the fee.

It was not deemed necessary in the original opinion, nor is it necessary here, to determine whether G. C. Medlock held only a life estate in the land or, as survivor of his wife, held under the first deed to them the fee, or whether he had the one or the other would not avail appellants.

Petition for rehearing overruled.

A. Duvall, Hallam & Gordon, A. P. Grover and H. P. Montgomery for appellants.

Geo. C. Drane for appellees.

"The period within which an action for the recovery of real property may be brought shall not, in any case, be extended beyond thirty years from the time at which the right of action first accrued to the plaintiff, or to the person through whom he claims, by reason of any death or the existence or continuance of any disability whatever." (General Statutes, section 4, article 1, chapter 71.) This is the statute controlling the decision of this case.

The last number of the Kentucky Law Journal contains a criticism by L. N. Dembitz, of the Louisville bar, that, if viewed from his standpoint and without regard to the statute, is calculated to mislead. His criticism seems to be fair and candid, but the writer overlooked the principal point in the case. The statute does not commence to run until the cause of action accrues to the party complaining, or to those under whom he claims. The tenant in remainder can not sue until the termination of the life estate, and, therefore, the statute begins to run against the remainderman at the termination of the life estate; and in this case, if the husband and father was tenant by the curtesy, no action could have been brought by the infants until the curtesy ended. No such question, however, is presented in this case for the reason that the thirty years' statute runs, although the party may be laboring under a disability—that is, a want of capacity to sue.

If a feme covert sells her land by parol or in coverture without joining her husband, and the party enters under that statute, the disability will protect neither the wife nor her children. If thirty years have elapsed from

the date of the sale the statute affords a complete bar, for at best the disability of coverture, the cause of action, would exist, or rather the statute of limitation would begin to run. After thirty years the existence or the continuance of any disability will not, as in other statutes, save the rights of the parties.

Treating, then, the wife as laboring under either the disability of coverture or infancy, it affords no protection to her or her children. Suppose the wife was living, and had brought the action instead of the children, alleging the death of the husband, her disability would not have prevented the running of the statute. The accrual of the cause of action under this statute is not capacity to sue for the reason the statute excludes all disabilities in determining that question.

The object of this statute was to quiet and render secure the title to real estate after the party had been in possession as the claimant or owner for thirty years.

If sold by a feme covert or by an infant they will be treated, after the party to whom the sale was made has been in possession for thirty years, as if they were laboring under no disability at the time of the sale.

In the particular case the wife as well as the husband made the sale. The purchaser entered, and after the lapse of thirty years the wife is to be regarded as if she was a feme sole when the sale was made, and laboring under no disability. So the question is, when did the thirty years' statute begin to run against the mother? If at the date of the sale it never stopped, notwithstanding her disability or that of the infants or the right of the father to possess the land jointly with her.

The Court of Appeals in effect decided this question in the case of *Connor and Wife v. Donner*, 4 Bush, 631.

DILLS v. MAY.

(Filed April 25, 1882.)

1. What constitutes *res gesta* declarations—"The general rule is that all declarations, made at the same time the main fact under consideration takes place, and which are so connected with it as to illustrate its character, are admissible as original evidence, being what is termed a part of the *res gesta*, in other words, part of the thing done."

2. *Res gesta* declarations of the defendant were admissible on his behalf in this action against him to recover damages for aiding and abetting a band of soldiers, who rifled the store of the plaintiff in Piketon, Ky., in 1862, such declarations having been made by the defendant in Piketon whilst the store was being rifled, it appearing that the defendant had voluntarily or accidentally entered the town with the band of soldiers, and remaining in the town whilst the store was being rifled.

Such declarations were admissible to show the intention with which he did any act, whereby his connection with the tort was sought to be established.

3. Exceptions to depositions, because defectively certified, must be filed before the expiration of the first term of the court subsequent to the filing thereof.

4. Depositions defectively certified may be, without any order of court, delivered or mailed, under seal, by the clerk to the examining officer and

the examining officer may amend his certificate and return the same when so required by the party for whom the deposition was taken. (Code, section 588.)

Appeal from Pike Circuit Court.

Opinion of the court by Judge Hargis.

This is the second appeal in this case. On the first trial a verdict was rendered for the appellant, but the judgment was reversed at appellee's instance.

A second trial was had, which resulted in a verdict for the appellee, and the court having rendered a judgment thereon dismissing appellant's action, he brings this appeal here, seeking a reversal on the grounds that incompetent evidence was admitted and a suppressed deposition allowed to be read to the jury.

The action was for an alleged participation by appellee in a tort committed by Menifee and his band in the year 1862.

It appears that Menifee, with his men, entered Piketon in August of that year, and rifled the store of appellant, taking from it several thousand dollars' worth of goods, and that the appellee had voluntarily, or accidentally, fallen in with Menifee and came with him to Piketon, and was there when the tort was committed.

The testimony relative to appellee's participation in it is conflicting, and with its weight we have nothing to do as it is sufficient to sustain the verdict, if no illegal evidence has been admitted.

The principal error insisted on is that evidence of what appellee stated after the forayers had reached Piketon, and while they were engaged in robbing the store, was hearsay, and, therefore, incompetent.

Mrs. Cecil testified this: "I was at home at upper end of Piketon; saw Henry May about two hours after night, or just before Dills passed out of town; May was at our house; during his stay two men came and said Menifee wanted H. May's horse to carry a load on; May replied, and said his horse could not carry stolen goods; May left our house in a few minutes."

The evidence of James L. Ratcliff was to the same effect, with this addition, that Menifee's men threatened to press May's horses, and the latter replied to them that "Col. Meni-

fee can not press them as long as my pistol will fire, and they did not press his horses."

Lockard testified that "May came down the walk; I met him at the door (of Hamilton House); Mrs. Hamilton said to May: 'They are making the goods fly;' 'Yes,' he says, 'they ought not to do it.'"

These conversations occurred a short distance from the store, and while Menifee's men were plundering it.

Was this testimony of the *res gestæ*, and, if so, was it admissible?

The general rule is that all declarations made at the same time the main fact under consideration takes place, and which are so connected with it as to illustrate its character, are admissible as original evidence, being what is termed a part of the *res gestæ*—in other words, a part of the thing done.

Mr. Greenleaf, section 108, 1st volume Ev., says that when a person does any act material to be understood, "his declaration made at the time of the transaction, and expressive of its character, motive or object, are regarded as 'verbal acts indicating a present purpose and intention,' and are, therefore, admitted in proof like any other material facts."

The nature of the alleged tort is not the only thing to be determined by the declarations of the appellee, who is charged to have incited or aided in its commission, they are admissible to show the intention with which he did any act whereby his connection with the tort is sought to be established.

In this case the character of the act of taking the goods is undisputed. It was a tort, but the acts of the appellee in traveling with Menifee and his band to Piketon, and what he said of any acts he may have done while there during the perpetration of the tort is competent as illustrative of his movements and presence, and explain his motive and object. And while the taking of the goods was tortious, and all persons who advised or engaged in it responsible in damage therefor, from which they could not exempt themselves by contemporaneous statement contrary to the legal nature of their acts, the real issue here is whether the appellee can be held liable, not by reason of the actual taking, but because of his presence as an aider or abettor.

His presence was not necessarily a guilty presence, it may have been from accident, duress, or with the purpose of protecting persons and property, and marked by the best of intentions, and consequently all his declarations tending to explain his presence, which was not in itself unlawful, made simultaneously with that presence, were admissible evidence as part of the *res gestæ* or acts done by him, and furnish the best, if not the only, clue to his motive.

It does not follow that the appellee participated or aided in the commission of the tort from the fact that the goods were taken and he was present, because while the taking was unlawful, his presence may have been lawful, and his declarations which throw light on his motive do not, therefore, render legal what is otherwise necessarily illegal, as supposed by council.

His silent presence would have tended to connect him with the tort, but illustrated by the words he then uttered such an inference was unauthorized, hence the great importance, in a case like this, of treating the words of the actor as part of his acts.

Had he actually broken open the store, or assisted in conveying away the goods, but declared, while doing so, that his purpose was innocent, he would nevertheless have been legally liable for the tort. And so if he came to Piketon to encourage the taking, and his object in being there was to give countenance to the wrongdoers, his deceitful declarations, made for the purpose of disguising the real object of his presence, could not exempt him from liability; but in all cases, where declarations have been made simultaneously with the main fact in issue, the jury must judge of the weight, consistency and sincerity of such declarations, as they do with reference to any other competent evidence adduced in the cause.

We can, therefore, see no error in the admission of the evidence concerning appellee's declarations.

The certificate of the notary to the deposition of James L. Ratcliff was defective, but no exception, on that account, was filed by appellant until after the expiration of the first term of the court subsequent to the filing of the deposition, and

the court, therefore, erred in sustaining the exception to the certificate. (Subsection 1, section 587, Civil Code.)

After the exception was sustained the appellee, without an order of the court, caused the clerk to send the deposition by mail to the notary, who amended the defective certificate and remailed it to the clerk, and the latter received and filed it.

It is insisted that it was necessary to obtain an order of court authorizing it to be done before the certificate could be amended. But we are of a different opinion.

Section 588, Civil Code, provides that "if the examining officer's certificate be defective, whether exceptions have been sustained or filed or not," the party for whom the deposition was taken may require the clerk to deliver the deposition or mail it, under seal, to the examining officer, and the only condition precedent to the exercise of this right by the party is the tender to the clerk of money enough to pay postage.

The clerk is required to endorse upon the deposition the time of mailing it, and, the examining officer the time and mode of its reception, and if he can truthfully do so, amend his certificate and return the deposition to the clerk, who shall endorse on the deposition the time and mode of its reception. (Section 588.)

These provisions are intended to avoid the delays which resulted under the Code of 1854 from omissions to file exceptions because of insufficient notice, or to defectively certified depositions, until the case was called for trial.

It often occurred under that Code that a deposition, after it had been filed and lain in court for several years, free to the inspection of all parties, was suppressed on an exception to it for defects in the form of the notice, caption or certificate, and that unnecessary delays, inconsistent with justice, were thereby wrought. And in order to break down such practices, and cure this defect in our civil procedure, it is provided in the present Code that no exception, other than to the competency of the witness, or to the relevancy or competency of the testimony, shall be regarded, unless it be filed and noted both before the commencement of the trial and before or during the first term of the court after the filing of the deposition

Hence the exception to the deposition in this case, on the ground that the certificate was defective, ought to have been overruled in the first place, because it was filed too late: and although the exception was sustained, no order of court was necessary to render the amendment of the certificate legal, as section 588 of the Civil Code authorizes amendments in the manner therein prescribed to defective certificates, either before or after exceptions, or at any time after the deposition has been filed, whether court be in session or not. We conceive that this is the only construction of this section of the Code which would give full effect to the intention of the law-making power.

Wherefore, the judgment is affirmed.

Ireland & Hampton for appellant.

Geo. N. Brown for appellee.

LITTELL v. WALLACE. &c.

(Filed April 27, 1882.)

Trustees of a church have power to sell a house and lot devised to them and their successors, "to be used, occupied and enjoyed by the church * * as a parsonage," if the interest and convenience of the congregation require a sale of the property, and the proceeds are to be reinvested in other property to be used as a parsonage.

A legislative enactment was not necessary to confer the power to make such sale, as a court of chancery has power to enforce the trust.

Appeal from Christian Circuit Court.

Opinion of the court by Judge Hargis.

In the year 1844 Mrs. Susan Preston made and published her last will and testament, by the second clause of which she devised "to the trustees of the Presbyterian Church in Hopkinsville, and to their successors forever, in fee simple," a house and lot, "with the buildings, heraditaments and appurtenances thereto attached and appertaining, * * * to be used, occupied and enjoyed by the church aforesaid and their minister as a parsonage."

The legislature in the year 1878 passed an act incorporating the trustees of said church, by which power and authority is conferred upon the trustees, upon the advice and consent of the congregation of said church, "to exchange or sell and convey the house and lot" in question.

The requisite consent and advice of the congregation to the sale of the house and lot was given, and the sale was made by the trustees to the appellant, who refused to accept the deed, regular in form and acknowledged according to law, because he doubted the ability of the trustees to convey to him a fee simple title for which he contracted with them.

This was a friendly suit to settle the question. The appellant signifies his willingness to accept the deed and pay for the property if it invests him with an absolute title.

The court below adjudged that the deed was sufficient for that purpose, and so we adjudge.

It is clear, from the provisions of the will, that the testatrix intended to invest the trustees of the church with a fee simple title to the property for the uses and purposes expressed by her, and the will creates a valid trust, capable of being executed by the trustees and their successors, whom she designated for that purpose.

The trustees and church are still in existence, capable of managing and enjoying the property devised in the mode specified by the testatrix, and certainly no reason can exist for a forfeiture in this case, and no reversion was ever contemplated by her, as she made the devise in fee simple, subject to no condition or limitation save as to the use of the property, the trustees being in duty bound, keeping in view, in good faith, the object of the testatrix, as expressed in the will, so to administer the trust as, considering the condition of the property and the circumstances and interests of the congregation, will best subserve the beneficent purposes of the testatrix.

The testatrix did not contemplate that the particular house and lot should be used forever as a parsonage, without regard to decay or inconvenience, her main object being to furnish a parsonage, to be used and enjoyed by the members of the church and their minister. We are of opinion that a sale and reinvestment of the proceeds in other property, to be devoted to similar uses, will carry out her intention and purpose as expressed in the will, and this power of sale, aside from the legislative authority, is essential to the execution of such a trust, as the decay, unfitness or inconvenience of the house as a

parsonage might ultimately defeat the intention of the testatrix if a sale could not be made.

The sale of the property so devised can not be made, as a matter of course, but in cases of this class, where the legislature has given the authority to trustees to sell and convey, by and with the consent of the beneficiaries, such advice and consent, when regularly given, as in this case, are sufficient to ascertain the propriety of the sale. (Stanly v. Colt, 5 Wallace, 119; Old South Society v. Crocker, 119 Mass., 1.)

Wherefore, the judgment is affirmed.

Petree & Littell for appellant.

John Feland for appellees.

ANDREAS' ASS'EE v. RUST, &c.

SAME v. CAMPBELL COUNTY BUILDING ASSOCIATION, &c.

(Filed February 7, 1882—Not to be reported.)

1. Assignee of bankrupt may recover money paid by the debtor, before making his assignment, in fraud of the bankrupt law.

2. To render such payment void the creditor must have knowledge of the insolvency of the debtor or have reasonable cause to believe the debtor insolvent, and that the payment was made in fraud of the provisions of the bankrupt law.

3. What necessary to make transfer a fraud against the bankrupt law:

First. The debtor making the transfer must be insolvent.

Second. If the transfer gives a preference, it must have been made with a view to give a preference to the creditor.

Third. In any event the person receiving the transfer must at the time have reasonable cause to believe the person making the transfer to be insolvent; and,

Fourth. Must also know that such transfer was in fraud of the provisions of the bankrupt act.

Fifth. The transfer must be made within four months before the filing of the petition by the bankrupt.

Appeal from Campbell Chancery Court.

Opinion of the court by Chief Justice Lewis.

These are two consolidated actions by appellant Betz, assignee in bankruptcy of appellee Andreas, to recover for the benefit of the creditors the amount of a note for \$214, and stock in a building association valued at \$186, transferred by Andreas to appellee Rust in payment of a note for \$250, given

4th of May, 1878, for borrowed money, and an account for work and labor and materials furnished, amounting to \$106.90.

It appears that the transfer was made on the 8th of August, 1878, and on the 10th of August Rust repaid to Andreas about \$46 in money, being the supposed balance after deducting the amount Andreas owed him from the amount of the note and stocks transferred.

On the 1st of August next after this transaction Andreas filed his petition in bankruptcy, and was declared a bankrupt.

Upon the trial the chancellor rendered judgment dismissing the petitions in both cases, and from that judgment this appeal is prosecuted.

To make such transfer void according to the provisions of the bankrupt law of the United States, and authorize the assignee in bankruptcy to recover the value of the property so transferred from the person receiving it, the following facts must concur:

1st. The debtor making the transfer must be insolvent.

2d. If the transfer gives a preference, it must have been made with a view to give a preference to the creditor.

3d. In any event the person receiving the transfer must at the time have reasonable cause to believe the person making the transfer to be insolvent; and,

4th. Must also know that such transfer was in fraud of the provisions of the bankrupt act.

5th. The transfer must be made within four months before the filing of the petition by the bankrupt.

Although Andreas may have been insolvent at the time the transfer was made, and it may have been made with a view to give a preference to Rust, still it is not void unless Rust had at the time reasonable cause to believe Andreas was insolvent, and also knew that the transfer was in fraud of the provisions of the bankrupt act.

In the language of this court, in the case of *Edwards v. Tandy*, 78 Ky., 170, "there must be something more than the knowledge of the fact of insolvency. It must be accompanied by such direct or circumstantial evidence as establishes * * that the creditor knew at the time the transfer was made that it was done in fraud of the provisions of the bankrupt law."

There is no sufficient evidence in these cases that Rust had at the time of the transfer reasonable cause to believe Andreas was insolvent, and none at all that he knew the transfer was in fraud of the provisions of the bankrupt act.

At the time Andreas, as he swears, had no purpose to avail himself of the benefit of the bankrupt law.

He was industriously engaged in his usual business, had a considerable amount of visible property, real and personal, more than sufficient at fair prices to pay all his debts, and if his business affairs had been judiciously managed he could easily have paid all his debts.

Rust, whose deposition is taken, swears positively that he had no reason to believe and did not suspect Andreas intended going into bankruptcy, and that he received the transfer of the note and stock in payment of what Andreas owed him without any knowledge that it was in fraud of the provisions of the bankrupt law.

In our opinion the chancellor did not err in dismissing the petitions in the two cases, and the judgment must be affirmed.

John S. Ducker for appellant.

F. M. Webster for appellees.

MILLER v. McCRORY, WHITE & CO., &c.

(Filed May 11, 1882—Not to be reported.)

1. Defect in stating a good cause of action in an imperfect manner should be reached by motion to make more specific, and not by general demurrer. (Posey v. Green, 78 Ky., —.)

2. Error of court in striking out a portion of the answer is not cause for reversal in this case as it was not prejudicial.

3. Money expended by appellant on property in the charge of the court, the expenditure having been made for the benefit of the appellant and without the sanction of the court, can not be recovered unless the court, in the exercise of its discretion consents thereto.

4. "The laborers, mechanics and material men held the first lien on the property covered by the mortgages" in this case.

The act of 1876 giving a lien in such cases to such persons is not unconstitutional in its application to this case.

5. Stipulation in mortgage that the debt should become due on the failure of the mortgagor to pay the rent or to keep up the insurance is legitimate, and a violation thereof entitles the mortgagee to a foreclosure.

6. Errors not prejudicial are not cause of reversal.

7. Sale of attached property during the litigation was not erroneous, as it must be presumed that it appeared to the court that it was to the interest of the litigants to sell.

The subsequent speculative advance in the value of property of the character of that sold will not invalidate the sale.

8. Failure to adjudge in terms that the order of attachment was wrongfully obtained was not erroneous, as this is a matter properly to be determined in an action on the attachment bond.

In action on the attachment bond, an order dismissing the attachment is ordinarily prima facie evidence that it was wrongfully obtained.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Hines, reversing on original and affirming on cross appeal.

The first question to be considered is as to the sufficiency of the pleadings. It is insisted that neither the petition nor the answer is good. Technically they are not, but the petition substantially sets forth a cause of action, and the answer states a substantial defense. The defect is not in a failure to state a cause of action or a defense, but in stating a good cause of action and a good defense in an imperfect manner. Such defects must be reached by motion to make more specific, and not by general demurrer. (Posey v. Green, 78 Ky., —.) The objection on the part of cross appellants that the court struck out a portion of the answer will not avail for reversal because it does not appear to have been prejudicial to cross appellants. The pleadings as they now stand present all the issues in an intelligent and effectual manner for the determination of the rights of the parties. The objection by appellant to the refusal of the court to allow the filing of the supplemental petition is not available. The work caused to be done by appellant in completing the mantles, and thereby increasing their value, was done without the sanction of the court, in whose charge the property then was. The amelioration was for appellant's own benefit, and having been done without authority from the court, which might have been obtained, there was no abuse of discretion in refusing to allow the filing of a pleading setting up claim for moneys so expended.

As to the question of fraud in obtaining the mortgages we think the evidence amply supports the finding of the court below, to the effect that there was no fraud in their obtention.

and that they are founded upon a valuable consideration. We have read with great care the voluminous testimony, and have no doubt that the articles of agreement for the partnership between McCrory, White and Charles Miller were understandingly entered into, and that the first mortgage was made in pursuance to the agreement for the partnership previously entered into.

There was no error in discharging the attachment. The evidence is not sufficient to sustain it upon any of the grounds alleged in the petition.

There was no error in adjudging against appellees \$728.08, instead of \$858.80, the amount stated in the mortgage, for the evidence is sufficient to establish that the difference between these sums had been paid to appellant.

The court properly adjudged that the laborers, mechanics and material men held the first lien on the property covered by the mortgages. The mortgages were executed after the passage of the act of 1876, giving a lien in such cases to such persons, and appellant must be held to have contracted with reference thereto. The case of Goodnight v. Adsitt has no application to this state of facts, and as to this case the act of 1876 is not unconstitutional.

But the court erred in so much of its judgment as dismissed that portion of appellant's petition which sought a foreclosure of the mortgage for \$1,000. The stipulation in the mortgage that the debt should become due on the failure of appellees to pay the rent or to keep up the insurance is legitimate, and a violation of this agreement, which is shown by the evidence, entitles appellant to proceed immediately to enforce his demand.

The rulings of the court in sustaining exceptions to depositions, where wrong, were not prejudicial to appellant, and will not, therefore, entitle him to have such rulings reversed.

The court did not err in ordering a sale of the attached property during the litigation. If it appeared to the court, as we must presume it did, that by reason of the cost of keeping the property it was to the interest of the litigants to sell, the subsequent speculative advance in the value of that character of property will not invalidate the order.

Nor was there any error in failing to expressly adjudge in terms that the order of attachment was wrongfully obtained. That is a matter properly to be determined in an action upon the attachment bond. In such an action the inquiry is as to whether the attachment was wrongfully obtained, and in the establishment of that fact ordinarily an order dismissing an attachment is *prima facie* evidence of its wrongful obtention, and if the suit was terminated by a finding in favor of the defendant on an issue as to the truth of the facts alleged as the ground for the attachment, then the judgment would conclusively establish that the attachment was wrongfully obtained. (Drake on Attachments, section 173.)

For the error in dismissing so much of appellant's petition as sought to enforce the mortgage for \$1,000, or for the amount due thereon, the judgment is reversed, but affirmed in every other particular, both on the appeal and on the cross appeal of McCrory, White & Co.

John R. M. Polk and A. M. Gazlay for appellant.

John Mason Brown and R. H. Blain for appellees.

COMMONWEALTH v. WILSON.

(Filed May 13, 1882.)

Capias for costs is not authorized.

When a fine is paid the judgment for the costs is to be collected by an ordinary execution.

If the defendant pays the fine before commitment he should be released from the custody of the officer.

If he pays after being committed to jail he should be released from imprisonment.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Pryor.

The appellee was indicted for an assault and battery and fined \$125, and a judgment rendered against him for that sum and the costs, amounting to \$50. In order to be relieved from imprisonment the appellee tendered to the clerk or trustee of the jury fund the amount of the fine, but failed to tender the amount of costs, and the clerk refusing to receive a less sum than the whole judgment the question arose in the lower court

as to the right of the clerk to issue a *capias* for the costs. The court below adjudged that the defendant could not be imprisoned for the costs, as it constituted no part of the fine.

Section 2 of chapter 26, General Statutes, provides that "the law of costs are not penal," and by section 289 of the Criminal Code it is provided "if the punishment of an offense be a fine, the judgment may direct that the defendant be imprisoned until the fine be paid, specifying, however, the extent of imprisonment, which shall not exceed one day for each two dollars of the fine." It is evident, we think, that when the fine is paid the judgment for costs is to be collected by an ordinary execution, and no *capias* should issue. The fact that the General Statutes provides that if a party is confined in jail for the nonpayment of a fine he may be released by the clerk upon his giving bond for the fine and costs does not control this case. Under that promise he is released, not upon the payment of the fine, but upon giving an obligation that he will pay it as well as the costs. If he pays the fine before commitment he should be released from the custody of the officer, and if when committed to jail he pays the fine, he should be released from imprisonment.

Judgment below is affirmed.

Attorney-General Hardin, E. W. Hines and John M. Porter for appellant.

J. E. Halsell for appellee.

DEMENT v. THOMPSON, &c.

(Filed May 13, 1882.)

A levy of an execution upon land may be made at one time and written out at a subsequent time.

It is not essential that the action of the officer in making a levy on real estate should be reduced to writing at the time the levy is made.

In this case a levy made before, but reduced to writing after, the death of the execution defendant is held to have been valid.

Appeal from Carroll Circuit Court.

Opinion of the court by Judge Pryor.

This is an action against the sheriff and his sureties on his official bond for the failure, as is alleged, of that officer to

levy an execution placed in his hands in favor of Dement against Ringo. There was an answer filed to the petition, to which there was a demurrer, and the demurrer going back to the petition it was sustained to the latter pleading, and the plaintiff failing to amend, the action was dismissed as to the sureties, and the execution plaintiff, Dement, has appealed.

The question involves the validity of a levy alleged by the sureties to have been made by their principal on the land of the execution debtor, Ringo.

The facts stated in the petition and answer, and about which there is no controversy, are these: While the execution was in the hands of the sheriff and in full force the officer saw Ringo and informed him that he had levied on a small tract of land owned by the latter to satisfy the execution, and at the same time endorsed on the execution levied, with the date of the levy, but failed to state upon what property the levy had been made. The execution debtor had no other property, and the sheriff had been directed by the plaintiff in the execution to make a levy on this land. When the levy was made the sheriff returned or delivered the execution to the attorney of the plaintiff, that the latter might write out a complete return, and in a few days after the defendant in the execution died, and before the sheriff or the attorney had by writing shown the nature or character of the levy made. The sheriff then proceeded to make his return in full, showing his action on the premises and returned the execution, which he filed first to the proper office. After this a motion was made by the representative and heirs of the debtor to quash the levy, and notice given of the intended motion to the plaintiff in the execution and the sheriff. The levy was quashed on the hearing of the motion, and, therefore, this action was brought. We do not regard it as essential that the action of the officer in making a levy on real estate should be reduced to writing at the time the levy is made. If the levy was in fact made, where the sheriff had the right, by nature of the execution, to make the levy, there is no reason why the sheriff, in a controversy with either the plaintiff or the defendant in the execution as to the fact of the levy, should not be permitted to show by parol that the levy was made. Here the fact of the

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levy is conceded by all parties, that is, that the sheriff informed the debtor he had levied on this land, and having made the levy the fact of his failure at the very moment to evidence his action, by an endorsement in writing on the execution, does not render the levy invalid. The usual mode in fact of levying executions on real estate by sheriffs is to make a mere memorandum, so as to enable them to have their returns made or written with that particularity necessary in levying on such property, and where no endorsement was made at the time the sheriff may show by parol when the levy was in fact made.

The sheriff when levying on real estate does not disturb the possession of the debtor or even his right of possession, and, therefore, the distinction between that character of levy and a levy on personal property. A mere paper levy by the sheriff on personal property amounts to nothing. He must take the possession or control of it, and a mere endorsement on the execution or a statement to the owner that he has levied on certain personal property, without any other action on the part of the sheriff, is no levy. It may be evidence of the fact that he has levied upon and taken the possession of or control of the property, but nothing more.

In the case of *McBurnie v. Overstreet*, 8 B. Monroe,—, this court held that “the fact of a levy upon real estate may be established by parol;” and further, that a levy upon real estate might be made by apprising the defendant of the fact without going on the premises. It is certainly the duty of the sheriff to enter upon the execution the nature of his levy, showing the particular estate levied upon, but the fact that he fails to make this entry at the moment, or on the day of the levy, does not render the levy invalid, whether made upon real or personal estate. How far the failure to make the endorsement is to affect innocent purchasers is not a question involved in this case.

It is agreed, however, that the motion to quash the execution having been sustained, the sheriff and his sureties are estopped from saying that this was a valid levy. We think not. The sheriff had no direct interest in the result of the motion, nor was he a necessary party to the proceeding. The fact of

the quashing of the levy prevented him from proceeding to sell under it, but could have had no other effect on his action. He had no right to appeal from the judgment or to question, by reason of any interest he had in the matter, the action of the court in sustaining the motion.

It was the duty of the plaintiff in the execution, who was the real defendant in the motion, to correct the error, and the judgment of the court on the motion does not estop the sheriff or his sureties from showing that the levy was properly made. The demurrer was, therefore, properly sustained.

T. J. McElrath for appellant.

Masterson & Gaunt and W. Montfort for appellees.

BARNETT v. RINGGOLD & CO.

(Filed May 23, 1882.)

Payment of note to fraudulent holder—Party paying takes the risk and must bear the loss.

Payment of note endorsed "Pay to Mad. Nat'l Bank, of Richmond, Ky., for collection" to a stranger or person not authorized to collect it or receive the payment was unauthorized, and did not discharge the note in this case.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Hargis.

The appellee held a note on the appellant for the sum \$248.13, dated March 30, 1880, and due sixty days after date. This was an action on that note by the appellees, who allege in substance that the appellant executed the note and has never paid it but has possession of it, which he obtained through the mistake of one of the employes of appellees, who endorsed it to the Madison National Bank of Richmond, Ky., for collection, and through inadvertance addressed the letter in which he had enclosed it to the appellant, instead of to the bank. The appellant pleaded payment of the note in the ordinary course of business, and denies that the note was sent to him by mistake.

The evidence of the appellees and their employes, and of the bank and its officers and employes, establishes the fact that none of them collected or received payment of the note, and

raises a strong presumption that the note was sent to the appellant through mistake, and that he thus obtained possession of it without payment. But, however this may be, the law relative to the payment of such paper so endorsed conclusively settles the rights of the parties. The appellant claims that he paid the note to a stranger or a person known to him at the time, but whose name he has since forgotten. The note was made payable to the order of the appellee at the Madison National Bank, Richmond, Ky. When it came to the hands of the appellant it bore this endorsement, to wit:

"Pay to Mad. Nat'l. Bk. of Richmond, Ky., for collection.
"F. G. RINGGOLD & CO."

This was a special authority to the bank authorizing it to make the collection of the note, and according to authority the bank, or its agents authorized to act for it, were the proper parties to whom the payment should have been made, and by whom the note could have been legally presented for payment, subject to the right of interference of the appellees, by revocation or otherwise. Had the supposed holder, to whom appellant contends he paid the note, produced it endorsed in blank, or had the note been payable to bearer, either would have been sufficient evidence of his right to present it and receive the payment. But the payment by the appellant to an unknown holder or stranger who had no right to collect it, either as agent in fact or bona fide owner, in the face of the special endorsement to the bank for collection by the appellees, was made at his own risk, as the possession with such an endorsement was notice to him that none but the bank or its agents, or the appellees and their agents, were authorized to present the note or receive the money thereon.

The appellees adopted the natural and proper method of informing the appellant of the fact that they had constituted the bank their agent for collection. And had he taken the precaution which ordinary prudence dictates, and read the endorsement plainly written upon the back of the note, he could have ascertained whether the person presenting it was the proper person to whom payment should have been made. And having paid the note to a fraudulent holder, if indeed he paid

it to any one, the appellant must suffer the loss because he took the risk.

Wherefore, the judgment is affirmed.

Smith & Mason for appellant.

C. F. & A. R. Burnam for appellees

TAYLOR v. COMMONWEALTH.

(Filed May 16, 1882—Not to be reported.)

Statute fixing punishment at confinement in the penitentiary for life upon third conviction for like offense is not unconstitutional.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Hines.

On an indictment for grand larceny, charging two prior convictions for like offenses, appellant was found guilty of the offense charged, and it was also found that he had been twice convicted and sentenced for like offenses, and the punishment for the last offense was fixed at confinement in the penitentiary for life. The punishment for grand larceny is, in ordinary cases, confinement in the penitentiary from one to five years.

This increased punishment is authorized by section 12, article 1, chapter 29 of General Statutes. The only question is whether this provision of the statute is in conflict with the Constitution, which provides that no one shall, for the same offense, be twice put in jeopardy of life or limb.

If we had any doubt of the constitutionality of this statute we would feel constrained to solve it in favor of the previous rulings of this court, and to hold the act constitutional. In *Mount v. Commonwealth*, 2 Duvall, —, such a law was held constitutional. The increased punishment for the last offense is no part of the penal consequences of the first and second, but applies exclusively to the last as aggravated by its repetition of the same crime. None of the evidence necessary to a conviction on the first or second indictment is heard on the last. Nothing is competent except the evidence that the former convictions had been had, and for like offenses. There is no trial on the issues made on the former indictments. The ac-

cused is not required a second time to make response to the charges of guilt in those indictments, but proof of the former convictions fixes his status, and to this status the increased punishment is applied without regard to whether the former convictions were rightful or wrongful.

Judgment affirmed.

J. H. Beauchamp for appellant.

P. W. Hardin for appellee.

ARNOLD v. COMMONWEALTH.

(Filed May 30, 1882.)

1. Rules for contempt are not required to be issued in the name of the Commonwealth, nor to show anything more, so far as the style of such proceedings is concerned, than that they were issued by the authority of the court in which the proceedings are to be had, and against the party required to answer.

2. Contempt of court is not an offense indictable by the grand jury, although a jury may be called on to aid the court in determining the quantum of punishment to be inflicted.

The legislature can not deprive the court of its inherent right to punish for contempt, but the mere arbitrary discretion of the court may be limited by giving to the party charged the right to a trial by jury, and requiring the judge to have a jury empanelled, where, in his opinion, the indignity offered requires greater punishment than he is authorized by the statute to enforce without the intervention of a jury.

3. Bond replevying a judgment for a fine for contempt of court extinguished the judgment, and was properly made to bear interest in this case.

Appeal from Jessamine Circuit Court.

Opinion of the court by Judge Pryor.

In August, 1880, during the progress of a trial in the Jessamine Circuit Court under an indictment against James H. Arnold for murder, the appellant, Isaac H. Arnold, with force and arms and in open court, obstructed the proceedings in the case, and was committed to the jail of Jessamine county to await the action of the grand jury. On the next day a rule was issued against the appellant, requiring him to show cause why he should not be fined or imprisoned, or both, at the discretion of a jury, for the contempt of hindering and obstructing the court and its proceedings, by forcibly assaulting the attorney for the Commonwealth while engaged in open court in the discharge of his official duties. The appellant appeared,

pleaded not guilty, and the jury empanelled to try the issue said he was guilty, and fixed his punishment by a fine of \$1,000, and imprisonment for twelve months. After going to jail he replevied the fine, as authorized by the statute, and execution having issued on the replevin bond, upon a written notice to the attorney for the Commonwealth, he moved to quash the replevin bond and the execution:

1st. Because the rule issued was in violation of article 4, section 5 of the Constitution, not being in the name of and by the authority of the Commonwealth of Kentucky, and against the peace and dignity of the same.

2d. The judgment is void under article 18, section 18 of the Constitution, because no indictment was found by the grand jury against him, and because the replevin bond is made to bear interest.

As to the first ground relied on it is sufficient to say that a mere rule for contempt or orders, emanating from a court during the progress of a trial, are not required to issue in the name of the Commonwealth, and we are aware of no law, constitutional or otherwise, requiring such proceedings to show anything more, so far as the style of the proceedings is concerned, than that they were issued by authority of the court in which the proceedings are to be had and against the party required to answer. The solution of this question depends, however, upon the disposition made of the second objection urged by counsel, that the appellant should have been first indicted by a grand jury of the county where the offense was committed. That the assault made upon the attorney for the Commonwealth was an offense at the common law can not be denied, but we do not understand that this is the gravamen of the offense, but it consists in the contempt offered the court by making the assault during the progress of the trial.

It is conceded that the court has the inherent power to punish, by fine and imprisonment, for such a contempt, and it might be added the legislature has no power to take from a court the power to protect itself against such flagrant contempt as was offered the court in this particular case, and to sanction the exercise of such legislative action would in effect defeat the administration of justice, and particularly in cases where the

Commonwealth is asking a conviction for the violation of its penal or criminal laws. The exercise of such a power by the judicial tribunal of the country is essential, not only in the attempt to enforce the laws for the prevention of crime, but for the protection of each and every citizen in the enjoyment of his property, and its exercise is not now questioned. The right to punish for contempt without the intervention of a jury was recognized and is fully established by the rule of the common law, and where the exercise of the power is admitted the fact that a jury may be called on to aid the court in determining the quantum of punishment to be inflicted is in no manner objectionable. Where the right to punish is with the court we are not prepared to say that it is not subject, in some degree, to legislative control, but, on the contrary, we are inclined to adjudge that a mere arbitrary discretion on the part of the judge may be limited, but an attempt, by legislation, to deprive the courts of the inherent power of protection against insults and indignities would be disregarded.

By section 1 of article 27, chapter 29, General Statutes, it is provided that "a court shall not for contempt impose upon the offender a fine exceeding \$80 or imprison him exceeding thirty hours, without the intervention of a jury." By section 2 of same article it is provided "in all trials by jury arising under this article the truth of the matter may be given in evidence." And by section 8 it is provided: "If any person shall, with force and arms, enter any courthouse, or room in which a court is held, during the time such court shall be in the discharge of its official duties, or if he obstruct or burden, by any means, such court from discharging its duties, he shall be fined or imprisoned, or both, at the discretion of a jury." It is maintained that such an offense is made a crime by this statute, and the court has no power to try the accused for it without the intervention of a grand jury.

That it is a contempt of court is not denied, but as the statute provides no mode of trial, or of bringing the party before court for trial, it is urged that it must be by an indictment. There was no necessity of providing a mode of trial. The manner for conducting such a proceeding was established by the rule of the common law, and has been followed by the

courts of this country, that is, by an attachment or rule against the party charged with the contempt to appear and answer, and the punishment, if the party was guilty, determined by the court without the intervention of a jury. All that the legislature has said is that the tribunal to whom the contempt is offered shall not, by way of punishment, exceed a fine of \$30 or imprisonment exceeding thirty hours, without the intervention of a jury. The rule of the common law has been modified by giving to the party charged the right to a trial by jury and the judge required to have a jury empanelled, where in his opinion the indignity offered requires greater punishment than that he is authorized to enforce by the statute. This change was for the protection of the citizen, and instead of restricting his rights under the laws or Constitution of his country, is an attempt to place him beyond the exercise of a power that would otherwise inflict punishment at discretion.

The question of the right of trial by jury in cases of contempt has been often made, but always denied. (*Ex parte Grace*, 12 Iowa, —; *Taylor v. Mockbie*, 9 Iowa, —; *Neel v. The State of Arkansas*; *State v. Mathews*, 6 New Hampshire, —; *Patterson v. Mason*, 4 Page, —; *People v. Bannet*, 4 Page, —.)

The questionable power in this case is the right of the legislature to regulate the action of the court in regard to the punishment for contempt, and certainly where the appellant has had a jury to pass upon his case he ought not to be heard to complain. While the citizen can not be thus summarily punished for a crime, the right to punish in a summary way, without a jury, for contempt is as ancient as the proceedings in courts of justice. As to the third ground for a reversal, while a judgment for a fine does not bear interest, the execution of the replevin bond extinguished the judgment, and in permitting a replevy that has that effect we see no reason why the bond should not bear interest, and particularly when replevin bonds under the statute bear interest, and there is no

exception made in this particular case, although the right to replevy generally applies to judgments in civil actions.

Judgment affirmed.

P. B. Thompson, Sr., for appellant.

P. W. Hardin for appellee.

COMMONWEALTH v. LOUISVILLE & NASHVILLE RAIL-
ROAD CO.

(Filed May 30, 1882.)

The Sunday law is constitutional.

Section 10, article 17, chapter 29 of the General Statutes, providing that "no work or business shall be done on the Sabbath day, except the ordinary household offices, or other work of necessity or charity," is not unconstitutional.

2. Running and operating a railroad train on the Sabbath is a "work of necessity," within the meaning of the statute, where the public convenience, necessities of trade, etc., require that the train should be run and operated on that day.

Appeal from Jefferson Circuit Court.

Opinion of the court by Judge Pryor.

This action was instituted in the name of the Commonwealth against the Louisville & Nashville R. R. Co. for an alleged violation of section 10, article 17, chapter 29 of the General Statutes, which provides: "No work or business shall be done on the Sabbath day, except the ordinary household offices, or other work of necessity or charity. If any person on the Sabbath day shall himself be found at his own or any other trade or calling, or shall employ his apprentices or other persons in labor or other business, whether the same be for profit or amusement, unless such as is permitted above, he shall be fined not less than \$2 nor more than \$50 for each offense. Every person or apprentice so employed shall be deemed a separate offense. Persons who are members of a religious society, who observe as a Sabbath any other day in the week than Sunday, shall not be liable to the penalty prescribed in this section, if they observe as a Sabbath one day in each seven, as herein provided."

Section 2 of title 1 of the Criminal Code provides: "A public offense, of which the only punishment is a fine, may be prosecuted by a penal action in the name of the Commonwealth of Kentucky, or in the name of an individual or corporation,

if the whole fine be given to such individual or corporation. The proceedings in penal actions are regulated by the Code of Practice in civil actions."

Under this provision of the Code these proceedings were had.

In the first paragraph of the petition it is alleged in substance that on the 3d day of April, in the year 1881, it being the Sabbath day, usually known as Sunday, the defendant (the railroad company) did run and operate over its railroad track in the county of Jefferson a certain train, consisting of one locomotive engine, baggage car and several passenger coaches. Said train was at the time running and transporting for the profit of the defendant passengers and their baggage, merchandise, express packages and the United States mails into the State of Kentucky for sundry points within the State, and through said State into other States; that for the purpose of operating said train on the day aforesaid the defendant did hire and employ certain persons to work and labor on the train as engineer, brakeman and baggage master, naming them, and for which labor they were paid their wages. It was further alleged that it was not a work of necessity or charity, and that those employed by the company, or either of them, did not observe as a Sabbath any other day in the week than Sunday.

The second paragraph relates to the running on the same day of cars transporting live stock, goods and merchandise destined for various points in Kentucky, Tennessee, etc., and by reason of these several violations of the statute the Commonwealth claims that the railroad company became liable to pay fines amounting to \$350, viz.: One fine of \$50 for running and operating the train, and six other fines of \$50 each for the employment of the persons engaged in the work and labor on the same.

The defendant, in answer to the petition, states that the running and operating its trains was necessary on the day alleged for the public service, and to enable it to discharge its duties and obligations to the public, and to comply with its contracts as a carrier for hire, engaged in transporting passengers and mails of the United States, and in carrying live stock, goods and merchandise from one point to another, in and out

of the State; that the hire and employment of the laborers on its trains was then and is now necessary for the safe and proper conduct of its business as a carrier; that the act in question, if applicable to the defendant, is in violation of the State and Federal Constitutions. An issue was formed, and the cause submitted to the court without the intervention of a jury. Several witnesses testified for the defense to the effect that it was absolutely necessary for railroad companies engaged in transporting passengers, freight and the mails in and out of the State to run their trains every day, including the Sabbath; that the public convenience and the necessities of trade require that this should be done; that the delays to passengers in traveling from one section of the State to the other, or from the different sections of the country, if this was not done, would prove vexatious and expensive, and sometimes ruinous, and that the transportation of live stock, fruits, vegetables, ice, fish, game, and, in many instances, merchandise, requires speedy and rapid delivery in order to preserve it and protect the rights of those interested in it.

The sole power of determining the policy of such an enactment as is brought in question is vested in the legislative department of the State government by the Constitution, and unless the passage of this Sunday law, as it is usually termed, is inhibited by some provision of that instrument it must be sustained. The legislative will is supreme on all such questions, and when not abridging the civil rights or privileges of the citizen must be held to be constitutional. The constitutionality of similar enactments has been passed on and sustained by courts of last resort in nearly every State of the Union, and this concurrence of opinion, together with a reference to former decisions of this court on kindred subjects, conclude, in our opinion, the constitutional questions raised, and we will discuss the application of the statute to the acts of this company alone, entertaining no doubt as to the constitutionality of the law.

The meaning to be attached to the words "or other work of necessity" found in the act must control the decision of this case, and if we are to attach to those words their scientific or physical meaning, that is, that the action of the company was

inevitable, or could not have been otherwise, its liability would at once be fixed, as it might have stopped its trains or declined to receive freight or passengers unless upon the agreement that the delay in transportation should relieve it from responsibility. Under such a ruling the cooking of food or the feeding of stock on the Sabbath might be dispensed with, and every other necessity in the way of labor that was not indispensable to man's existence. Could this have been the legislative intent when using such language in the statute, or shall we not interpret the words as having a legal meaning designed to apply to the wants of the citizen, adapting the language in its construction to the manners, habits, wants and customs of the people it is to affect, and in many cases the rights and duties of those charged with a public or private duty and the obligations they are under to others must also be considered in determining the character of labor falling within the statutory prohibition. It is argued in the case of *Sparhawk v. The Union Passenger Railway Co.*, 54 Pennsylvania, —, that it was not intended by such acts to exempt the party charged from the prohibition of the statute, because his labor was a work of necessity to others, but it must be a work of necessity to him who does the labor. We do not so construe the statute. If so, why protect the apothecary who sells his medicines for the relief of the patient, or the dairyman who furnishes the milk for his customers, or the hotel keeper who furnishes his guests with food and lodging. It is the exigencies of the object to be accomplished that determines to a great extent the means to be resorted to for that purpose. No safer rule, we think, can be established or any better definition given of the word necessity than is found in the decision cited, as adverse to the views herein expressed, and that is: "The law regards that as necessary which the common sense of the country, in its ordinary mode of doing business, regards as necessary. The change in the habits and customs of the people and the mode and character of transportation and travel make that a necessity at this day that half a century since would not have been so regarded."

It is impossible, and certainly not practicable, to draw the line of distinction with certainty between works of necessity

and such labor as falls within the denunciation of the statute, and we are not disposed to venture so far as to attempt to place a limit to the meaning of the word necessity when applied to the wants of man. In the case of *McGartvick v. Was-son*, 4 Ohio State, —, it was held that "works of necessity are not limited to the preservation of life, health or property from impending danger." The necessity may grow out of, or indeed be incident to, the general course of business, or even be an exigency of a particular trade or business, and yet be within the exception of the act, hence the danger of navigation being closed may make it lawful to load a vessel on Sunday, if there is no other time to do so.

In the case of the *Philadelphia & Baltimore R. R. Co. v. Steam Towboat*, 23 Howard, —, the court said: "We have shown, in our opinion delivered at this term, that in other Christian countries, where the observance of Sundays and other holidays is enforced by both church and State, the sailing of vessels engaged in commerce, and even their lading and unlading were classed among the works of necessity, which are excepted from the operation of such laws. This may be said to be confirmed by the usage of all nations so far at least as it concerns commencing a voyage on that day." Railroad companies as carriers of passengers furnish at this day almost every accommodation to the traveler that is to be found in the hotels of the country; his meals as well as sleeping apartments are often furnished him, and to require the train, when on its line of travel, to delay its journey that the passengers may go to a hotel to enjoy the Sabbath, where the same labor is required to be performed for him as upon the train, or to require him to remain on the train, and there live as he would at the hotel, would certainly not carry out the purpose of the law, and, besides, the necessity for reaching his home or place of destination must necessarily exist in so many instances as to make it indispensable that the train should pursue its way. So of the trains transporting goods, merchandise, live stock, fruits, vegetables, etc., that by reason of delay would work great injury to parties interested. A private carriage, in which is the owner or his family, driven by one who is employed by the month or year to the church in which the owner worships, or

to the house of his friend or relative on the Sabbath, is not in violation of the statute. So in reference to the use of street railroads in towns and cities on the Sabbath day. Those who have not the means of providing their own horses or carriages travel upon street cars to their place of worship or to visit their friends or acquaintances, and such is the apparent necessity in all such cases that no inquiry will be directed as to the business or destination of the traveler, whether on the one car or the other, nor will an inquiry be directed as to the character of the freight being transported. Nor will the person desiring to hire the horse from the livery stable be compelled to disclose the purpose in view in order to protect the keeper from the penalty of the law. Such employments are necessary, and not within the inhibition of the statute. The common sense as well as the moral sentiment of the country will suggest that the merchants who sell his goods, or the farmer who follows his plow, or the carpenter who labors upon the building, or the saloon keeper who sells his liquors on Sunday, are each and all violating the law by which it is made penal to follow the ordinary avocations of life on Sunday. The ordinary usages and customs of the country teach us that to pursue such employments on the Sabbath is wrong. Every man can realize the distinction between pursuing such avocations and that of transporting the traveler to his home, or the pursuit of such employments as must result from the necessary practical wants of trade.

This statute is only a civil regulation enacted from motives of public policy alone, and to discuss it in a religious point of view would be to attribute to the legislature the exercise of a power it does not possess, that is, to enforce the performance of religious duties.

Judgment affirmed. Judge Hargis dissenting.

Judge Hargis delivered the following dissenting opinion:

The statute forbids any person, artificial or natural, from engaging in the ordinary business, trades or callings of life on the Sabbath day, and none are exempted out of its provisions, except members of certain religious societies.

And while entertaining great respect for the views of the majority of this court, I am constrained to dissent from their opinion in this case, because I do not believe that the work or

business of a railroad is either a necessity or charity in the sense of the statute, or that the legislature thought so when it enacted the law.

If the legislature had deemed it proper it would have exempted railroads from the terms of the statute, but it did not do so, and for this court to interpolate by construction exceptions not contained in the statute, or to determine that the words "necessity or charity" embrace the ordinary work, business, trade or calling of any person, artificial or natural, is to violate in the boldest form, and with the least legal excuse for it, the rule which forbids "judicial legislation," and which is absolutely necessary to the preservation of the legitimate functions of the legislative department of the government.

I, therefore, respectfully dissent from the construction put upon the statute by a majority of the court.

TURNER v. COMMONWEALTH.

(Filed May 16, 1882—Not to be reported.)

1. The right of the appellant to prosecute an appeal will not be determined by the Court of Appeals, where no appeal was prayed in the court below and there is no record showing the evidence upon which the conviction was based.

2. The whole record should be brought to the Court of Appeals—The court say: "We are asked to reverse because the court refused a continuance, and only that part of the record is here showing the affidavit for the continuance and the denial of the motion by the presiding judge."

Appeal dismissed because the whole record was not filed in Court of Appeals.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Pryor.

It is not necessary to determine the question as to the rights of the appellant to prosecute an appeal in a case where no appeal was prayed in the court below, as there is no record before us showing the evidence upon which the conviction was based.

The sole ground for a new trial, and the only exception taken in the court below, was upon the refusal of the court to grant a new trial on account of the absence of a witness. No bill of exceptions was filed or tendered, and the affidavit shows that

other witnesses, of more importance to the accused, were either examined or could have testified as witnesses on the trial. Whether they did testify or who did testify in the case does not appear, and there is no mode of ascertaining the effect of the statement of this witness or the extent to which the accused was prejudiced by the refusal to continue the case in the absence of the testimony upon which the conviction was had. There are no exceptions to the instructions, and if any had been made they contain the law in regard to homicide, and the accused was properly convicted if the facts authorized it. The sufficiency of the evidence was with the court and jury below, and what that evidence was this court can not know, as no part of it is found in the record. We are asked to reverse because the court refused a continuance, and only that part of the record is here showing the affidavit for the continuance and the denial of the motion by the presiding judge.

Any ruling by the court below might be regarded as error, and a reversal had if only parts of the record are brought to this court. The accused would always omit to bring that part of it here conducing to show that the judgment was proper. A part of a record might sometimes justify a reversal when the error committed was such as could not possibly be cured by any subsequent proceeding, but this can not apply to a mere question of evidence, and to dispense with the bill of exceptions in such a state of case would in effect enable parties to reverse judgments in every instance where an appeal is prosecuted.

It appears from the record in this case that the accused is to suffer the penalty of death for the commission of the crime of which he has been convicted, and from the statement of counsel who appeared in this court in his behalf the discovery of testimony since the trial has thrown much light upon the matter of his defense, and if true would probably result in his acquittal or in mitigation of his punishment.

The issue in this case is of such importance, when considered with reference to statements of counsel made here, as to require additional investigation, not with a view of ascertaining whether an error was committed by the enlightened judge who tried this case below, but of ascertaining the existence of cer-

tain alleged facts, and not heard below, that if true would at least lessen the punishment. But the helpless condition of the accused, the severity of the punishment, and the want of knowledge on the part of counsel, who were only appointed to defend for him, as to the true history of the case, and the failure to make such a record as would enable him to appeal, are arguments to be addressed to the executive and not the judicial department of the State.

The appeal must, therefore, be dismissed.

Sharp & Beauchamp for appellant

P. W. Hardin for appellee.

HOOSER v. HOOSER.

(Filed May 26, 1882—Not to be reported.)

1. Administrator having distributed the estate of his decedent, without requiring refunding bonds of the distributees, under the erroneous belief that a debt against the estate was satisfied, which belief was not authorized by the conduct of the creditor, is held responsible as if the assets were in his hands.

If the administrator has acted in good faith he may recover of the distributees whatever sums he may be compelled to pay the creditor.

2. The wife can not be held responsible for the rent of land occupied under an agreement between her husband and the landlord, there being no proof of his agency.

Appeal from Todd Circuit Court.

Opinion of the court by Judge Hines.

Appellant instituted action on a note for \$1,802.37 against appellee, as administrator of G. W. Hooser, obtained judgment, which, on appeal to this court, was affirmed. Appellant then instituted this suit against the administrator, charging devastavit. Appellee admits that there has been a large surplus of the estate which he had distributed to the heirs without requiring a refunding bond, but says there ought not to be any judgment against him for the reason that he had been misled by appellant to believe the debt had been satisfied, and it was under that belief that the estate was distributed. He alleges that appellant held a note against Daniel Hooser for about \$1,800, which she induced his decedent, G. W. Hooser,

to take up and to execute to appellant his own note in lieu thereof, which is the note sued on, and that it was agreed between appellant and G. W. Hooser that he should take a mortgage from Daniel Hooser to secure himself, and that appellant was to look to the mortgaged property for her debt, and that G. W. Hooser was not to be held personally liable on his note to appellant; that after the death of G. W. Hooser, and pending the suit to foreclose the mortgage from Daniel to G. W. Hooser, in order to carry out the first agreement, appellee agreed with appellant that he would buy the mortgaged land for appellant, and that she was to take the land (after paying a prior lien) in discharge of her debt; that he did buy the land for her; that she took possession of the land, surrendered the note to G. W. Hooser, but subsequently induced him to return her the note; and that appellant did not repudiate the agreement until after she had been in possession of the land some two or more years, and that in the meantime he had distributed the assets. The court below refused to give a personal judgment against appellee, but directed that the land be sold to pay the debt, and adjudged that appellant be charged \$400 for the use of the land. From that decree appellant appeals and insists that she ought not to be charged with rent, and that she is entitled to a personal judgment against appellee.

The first judgment is conclusive as to the liability of the estate, but not as to the personal liability of appellee. He may make any defense affecting his personal liability that does not go to affect the liability of the estate. He was a party to the first suit, although in a different capacity, and had an opportunity to make, and it was his duty to make, any defense for the protection of the estate and of himself that would exonerate the estate. The only question then is, has there been any wasting of the estate, or is appellant, by reason of the agreement with appellee, estopped to look to appellee for the satisfaction of her claim? We think the evidence does not authorize the raising of an estoppel as against appellant. Appellee testifies that the agreement was made with appellant's husband, and there is no sufficient evidence of agency on the part of the husband, nor was the conduct of appellant such as to authorize the conclusion on the part of appellee that the

debt was satisfied by the purchase of the land. Appellee having acted under an erroneous belief, not authorized by the conduct of appellant, and having distributed the estate without requiring refunding bonds, he ought to be held responsible as if the assets were in his hands. If appellee has acted in good faith in these transactions he may recover of the distributees whatever sums he may be compelled to pay to appellant on her claim.

It was error to allow appellee credit by the rent. As we have seen, the agreement in regard to the land was with the husband of appellant, and to charge the rent to appellant would in effect be to compel her to pay her husband's debts out of her separate estate.

Judgment reversed and cause remanded, with directions to enter judgment against appellee for the amount of appellant's claim that may remain unsatisfied by the sale of the land.

Ben T. Perkins, Jr., for appellant.

H. G. Petrie and W. L. Reeves for appellee.

COMMONWEALTH v. WHIPPS.

(Filed May 18, 1882—Not to be reported.)

1. Lottery franchise granted to W. C. D. Whipps, to sell Willard Hotel property by lottery, is held to be constitutional by an equal division of the court, such equal division resulting in an affirmance of the judgment of the Jefferson Circuit Court dismissing the indictment against him for violating the general statute against lotteries, etc.

2. "Public emoluments or privileges"—These words as used in section 1 of the Bill of Rights, "that all freemen, when they form a social compact, are equal, and that no man, or set of men, are entitled to exclusive, separate, public emoluments or privileges from the community but in consideration of public services," were intended to prevent the exercise of some public function, or an exclusive privilege affecting the interests and rights of the public generally, when not in consideration of public service.

"Privilege" means a public privilege.

3. Special privileges may be constitutionally granted to one or more citizens where the rights of others are not affected by it.

4. A mere privilege granted by the legislature for the exercise of a private right is always subject to legislative repeal until such rights are acquired under it, and even after, except in so far as it may be necessary to protect or preserve the property rights already acquired.

5. In *Gordon v. Winchester Building Association*, 12 Bush, 110, a citizen claimed that his private rights would be violated by requiring him to pay interest which was usurious under the general laws of the State.

Appeal from Jefferson Circuit Court.

Opinion of the court by Judge Pryor.

The appellee, W. C. D. Whipps, was indicted by a grand jury, empanelled in the Jefferson Circuit Court, of the offense of promoting a lottery by permitting a building, occupied and owned by him, to be used for the sale of lottery tickets for the disposal of money and property by way of lottery, and by advertising a lottery, known as the Willard Hotel Lottery, by which it was proposed to dispose of certain property (described) by lottery, etc. No objection was made to the indictment, and the defendant by his plea traversed the charges made against him, and by an agreement between the attorney for the State and the accused the law and facts were submitted to the court for judgment. On the hearing the appellee relied on an act of the legislature, approved the 27th of April in the year 1880, as vesting him with authority to sell certain property, of which he was the owner, by lottery. Section 1 of that act provides "that it may be lawful for W. C. D. Whipps, of Louisville, Jefferson county, Ky., to dispose of the Willard Hotel property, situated on Jefferson street, in the city of Louisville, Ky., with two houses and lots on Green street, in the rear of the Willard Hotel, etc., and for that purpose may issue and sell, by his agents, as many certificates of specified undivided interests therein, at prices which will, in the aggregate, amount to the fair equitable value of the property, and the cost of disposing of the same in the manner hereby authorized.

"Sec. 2. That Robert Mallory, L. M. Flournoy, H. Clay, H. P. Whittaker and G. A. Winston, be, and they are hereby, appointed commissioners, any three of whom may act, whose duty it shall be to determine by lot, as may be mentioned in said certificates, to what shareholder or shareholders any portion or portions of said property shall belong, and to whom the title thereto shall be made, and to do and perform all such acts as in their opinion may be necessary to carry this act into full effect, and shall invest the funds arising from said cer-

tificates in the payment of the just creditors of the said Whipps.

"Sec. 3. This act is intended to apply to the property described herein, and to no other, and when said property is sold said grant shall cease and be of no effect, provided that there shall in no event be but one distribution or drawing under this act," etc. By reason of this act the appellee claims the right to dispose of his property by way of lottery, and to appropriate the proceeds to the payment of his creditors.

The court below adjudged in his favor by dismissing the indictment, and the Commonwealth is in this court asking a reversal. The attorney for the State maintains that the act in question is in violation of section 1 of the Bill of Rights. The section reads: "That all freemen, when they form a social compact, are equal, and that no man, or set of men, are entitled to exclusive, separate public emoluments or privileges from the community but in consideration of public services."

The proper construction or true meaning of this section of the Bill of Rights is the issue presented, and we are aware of no case decided by this court where the question has been duly considered, if at all, and certainly no case analogous to the one under consideration. Without discussing the grammatical construction of the language used in the section it is plain, we think, that this constitutional inhibition was intended to prevent the exercise of some public function or an exclusive privilege affecting the interests and rights of the public generally, when not in consideration of public service, and if made to apply to the exercise of mere private rights or special privileges it nullifies almost innumerable legislative enactments that are to be found in our private statutes, sanctioned in many instances by every department of the State government. It is our boast, as is urged by counsel for the State, "that under our government none are entitled to exclusive rights, but that all are governed by equal laws, subject to like burdens and entitled to equal privileges—'having one rule for the rich and poor; for the favorite at court and countryman at plough,'" but this doctrine of equality or maxim of constitutional law does not mean that every man must be permitted to exercise the same special or private privileges. Special privileges may be granted to one or more citizens, where the

rights of others are not affected by it. We have general laws, enacted for the protection of life, person and property, with the right to acquire and use our property and its accumulations as we see proper, subject to these general laws and when not interfering with the rights of others. The citizen has the right to demand that he shall be governed and protected by these general laws, and when excluded from such protection it is in plain violation of his constitutional rights. An absolute equality of private rights in the exercise of special privileges, if ever possible, is not practicable under our form of government in the light this case has been presented by counsel for the State. Special privileges must be granted as a matter of necessity, originating not only by reason of our form of government, but from the general laws enacted for the protection of person and property. General laws can not always be applied to individual necessities, and particularly with reference to the right of property, and when a special privilege is granted with reference to one's own property and without injury to others, we perceive no constitutional objection to it. If the legislature should be denied the right, by an amendment to the Constitution, to legislate with reference to local or private interests, the sovereign (the people) would confer this right to local tribunals vested with similar powers.

What interest has A in the sale and transfer of the property of B, if it in no manner affects his private rights, and, while under the general law, the right of each to sell and convey their property in the same manner can not be denied, if B, by special enactment, is empowered to sell and transfer his land in a different way, we can not well perceive how this affects the constitutional rights of A. It is insisted, notwithstanding the existence of the general law, that the special privilege is unconstitutional, because every citizen is not authorized to sell in the same mode; that it is a legislative invasion of the rights of equality, and for that reason within the constitutional inhibition. Conceding, for the purposes of this case, that this section of the Constitution applies to the exercise of a mere private right or special privilege, where is to be found any word of exclusion in the grant of the right to sell the house of the appellee by lottery, or the land of B by parol, and what is to prevent the legislature from granting a like privilege to

any citizen upon making the application. But the word privilege, in the meaning of the Constitution, is a public privilege, and not the exercise or enjoyment of a special privilege.

Where the citizen undertakes to discharge a duty to the public that the State is under an obligation to discharge, and in consideration for the undertaking an exclusive privilege is granted, the grant is constitutional, because in consideration of public service. The exclusive right to keep a ferry, to construct and operate highways, all such exclusive rights are based upon a consideration rendered the public in the discharge of a duty the State was required to perform. It becomes a binding contract, and can not be violated by either the State or the citizen, nor can it be repealed unless that right is reserved in the grant or by reason of some general law, and until the repeal it has all the essential elements of a contract, and the right of the parties under it can not be disturbed.

A mere privilege granted by the legislature for the exercise of a private right is always subject to legislative repeal, and while rights of property, acquired by reason of such special privileges, can not be divested, the right to repeal exists until such rights are acquired under it and even after, except in so far as it may be necessary to protect or preserve the property rights already acquired. This constitutes the principal distinction between grants in consideration of public service and mere privileges for the advancement of private interests. The question as to the right of a State to contract with the citizen is not involved in this case. The State may contract with its citizens with reference to matters of public necessity, and such contracts are as binding as contracts between individuals, the only difference being that when the State violates its contract the citizen is without any coercive remedy, unless permission is given by the State to the party injured to seek redress by action for the wrong complained of. The case cited by counsel bears but little analogy to the cases before us. In the case of *Holden v. James*, 11 Mass.,—, an attempt by legislation was made to suspend the statute of limitation in a particular case,

so as to take it out of the operation of the general law. The case of *Lewis v. Webb*, 3 Greenleaf,—, was where an appeal was authorized by the legislature in a particular case, regardless of the general law, and in *Durkee v. Janesville*, 28 Wis., —, the city of Janesville was exempted from costs in a proceeding against it by Durkee. This legislation was plainly in violation of the individual rights of others, and a disregard of the great principle of constitutional equality so earnestly contended for by counsel, although the decision in each case was based mainly on the ground that the legislature was attempting to prescribe to courts of justice the character of judgments to be rendered, and was an exercise of judicial power by the legislature, in violation of the plain provisions of the Constitution.

In the case of *Holden v. James*, 11 Mass.,—, already referred to, the general limitation law had been suspended for the benefit of one party so as he might sue, and his adversary prevented from pleading the statute. In the discussion of that case it was said that "the act was contrary to natural justice, and to the spirit of the Constitution and laws of the State by giving to one citizen privileges and advantages denied to others." And so in all the cases where private rights are invaded or jeopardized by legislative enactment the granting of a privilege to one, by way of exemption from the operation of a general law, is denounced by the courts as subversive of the rule of constitutional equality, and in the discussion of this class of cases is to be found the language used by the courts that is now offered as authority for holding the act before us unconstitutional. Suppose the State, with reference to its own claim against the citizen, should have suspended the statute of limitation, or after judgment had authorized an appeal, when at the time the judgment was rendered the law did not warrant such a proceeding, can it be maintained that such legislation would be unconstitutional? No right has been interfered with in such a case except that of the State, and the sovereign power may not only grant the appeal, but release the debtor from his contract. (*Calkins v. The State*, 21 Wis.,—, *People v. Frisby*, 26 Cal.—,) "Privileges (says Cooley in his *Work on Constitutional Limitation*) may be granted to particular individuals when, by doing so, the rights of others are not in-

terfered with," and we can see no constitutional objection to the exercise of such legislative power. It is a mere question of policy to be determined by the legislator, and not the judge.

This character of legislation has been indulged in since the formation of the State Constitution, and has met the approval of every department of the State government, and it is now too late to question the exercise of such a power. The right to sue the State may, by special legislation, be given to one, and at the same time withheld from another by reason of the general law. It is said, however, that this is expressly authorized by the 6th section of article 8 of the Constitution, that provides "the general assembly may direct by law in what manner, and in what courts, suits may be brought against the Commonwealth." This permission does not authorize a violation of the doctrine of equality under the law, and a permission by one to sue the State without the same privilege given to all others is in violation of the fundamental law, if we adopt the theory presented by counsel for the Commonwealth. Suit after suit is permitted to be instituted against the State by the individual citizen, and when not affecting the rights of others there can be no objection to it. The legislature may, and often does, authorize one under the age of twenty-one years to exercise all the rights of an adult with reference to his estate and business affairs, still if the views of counsel prevail, all such acts are unconstitutional because the same right is not granted to every citizen who is not an adult.

The charter of every private corporation, in which the public can have no interest except such as may arise by reason of business relations with them, contain grants of privileges that do not belong to an individual or to similar corporations. Such rights are not exclusive, whether granted to a corporation or to an individual, they are exceptional privileges merely, and operate only in the mind of the legislator as advancing the private interests of the party obtaining the grant, without affecting the rights of others, and such legislation is not open to constitutional objection. The exclusive right to trade in a particular locality, or to purchase and sell the products of the farm in a particular county, is not only in violation of the Constitution, but was illegal and void at the common law.

Monopolies are odious, and exclusive rights, such as those mentioned, can not be granted. The slaughter house cases, with dissenting opinions, reported in 16 Wallace,—, would have been so held, but for the position assumed, that the act was a police regulation, necessary for the health and comfort of the people.

In the case of *Gordon v. Winchester Building Association*, 12 Bush,—, where the corporation had been authorized to loan money at 10 per cent. interest, this court held in an action to recover the money that the act authorizing a loan for interest exceeding that permitted to be charged by the general law was unconstitutional, and in the decision of the case regarded it as an exclusive right conferred on the association that brought it within the constitutional inhibition. Whether the reasoning in that case is sound is not material to inquire in this case, as the court differs upon the question, as it had heretofore differed upon a similar question brought up from the Louisville Chancery Court. In the case of *Gordon* the money was loaned at 10 per cent. interest and a premium of \$66 required to be paid for the privilege of borrowing, and the case might well have been brought within the rule with reference to such associations upon the question of usury as settled by this court in the case of *Herbert v. Kenton Building Association*, 11 Bush,—. *Gordon* was complaining in that case, and this court had at least a party before it who claimed that his constitutional rights would be violated by requiring him to pay this money to the corporation.

Lottery grants are now in existence in this State, and their constitutionality has never been denied, nor can the theory of counsel be maintained that their validity is upheld by reason of, or in consideration of, public service. There is no more obligation on the State, through its legislature, to maintain a public school at Frankfort than there is to pay the debts of the appellee, and if so, why grant a lottery privilege to the one college and deny the right to a like college located in a different locality? It is conferring a privilege on one and withholding it from the other. They are in fact mere special privileges acquired under legislative grant for the advancement of private or local interests that in no manner violates the rights.

of others, and neither grant can be said to have been made in consideration of public service.

The motive prompting the legislature to make the grant can not be inquired into by this court. Plenary power in the legislature for all purposes of civil government is the rule, with uncontrolled authority in making the laws within the limits of the Constitution. This court has nothing to do with the moral question involved; if it had the case could be easily disposed of. "The legislature makes, the executive executes, and the judiciary construes the law." (Cooley's Constitutional Limitation.)

An additional argument in favor of the constitutionality of the measure is the practical construction placed upon this section of the bill of rights by the constant legislation of the State conferring special privileges since the formation of the State Constitution. When such is the case, says Cooley, "a strong presumption exists that the construction rightly interprets the intention;" "and, besides," says the same author, "where the question of construction, after all the investigation given the subject, remains a matter of doubt, it is clear that the court should abstain from deciding it unconstitutional." The appellee, Whipps, was involved in debt, and the legislature, upon his application, granted him the privilege of selling his property by lottery at a single drawing, the proceeds to be applied to the payment of this indebtedness. The extent of the grant and the power conferred by it is not questioned. The Commonwealth, after making the grant, has indicted him for proceeding to act under it, and is insisting that he shall be fined in a sum not exceeding \$10,000 for promoting a lottery. No other party is complaining, and the citizen, by reason of the grant, deprived of no right he had when the grant was made. Can this penalty be enforced, and is the act unconstitutional? Both questions must be answered in the negative, and the judgment below is, therefore, affirmed. Judges Hargis and Hines dissenting. (McReynolds v. Smallhouse, 8 Bush, —; Williams v. Commonwealth, 27 Miss., —; Patterson v. Trabue, 3 J. J. M., —; Kibby v. Chetwood's Adm'r, 4 Mon., —; Sheehan v. Basset's Heirs, 6 Mon., —; Commonwealth v. Jackson, 5 Bush, —.)

Judge Hines delivered the following dissenting opinion, in which Judge Hargis concurs:

I am unable to concur in the opinion affirming the judgment of the lower court by an equal division here, and, therefore, proceed to state my reasons for believing that the judgment should be reversed.

Appellee was indicted for setting up and promoting a lottery, which is denounced by the general law, with a penalty of from \$500 to \$10,000, and in defense he relied upon an act passed for his benefit, which was held by the court below to be a protection.

That act is entitled "An act for the benefit of W. C. D. Whipps," and authorizes him to run a lottery for the purpose of selling certain real estate and personal property belonging to him, and directs that the proceeds of the drawing be paid to the creditors of Whipps.

The only question I need discuss is whether this act is not unconstitutional because forbidden by the first section of the Bill of Rights. That section reads as follows:

"That all freemen, when they form a social compact, are equal, and that no men, or set of men, are entitled to exclusive, separate public emoluments or privileges from the community but in consideration of public services."

It is insisted by counsel for appellee that this provision was aimed at the exclusive exercise of some public function, and was intended to prevent the creation of hereditary offices and titles of nobility. This can not be the proper construction, for the 28th section of the Bill of Rights expressly says that the general assembly "shall not grant any title of nobility or hereditary distinction, nor create any office, the appointment to which shall be for a longer time than for a term of years." If it had been intended to embrace these matters in the first section it was idle to include the 28th section, and to give the first section any effect it must be taken to cover something else.

That the first section does apply to something else, and that it was intended to embrace a case like this was expressly adjudged by this court in the case of *Gordon, &c. v. Winchester Building Association*, 12 Bush, —. At the time of the passage

of the charter of that association the general law forbade, under a penalty of the forfeiture of all the interest, the charging of interest at a greater rate than 10 per centum per annum. The charter authorized the association to charge more than 10 per centum, and this court declared the act unconstitutional because it granted to the association an exclusive privilege without the consideration of public service on the part of the association. The opinion of the court in the case now under consideration does not undertake, in express terms, to overrule the Gordon case, but it is said that the opinion in that case might well have been placed on the grounds upon which the case of *Herbert v. Kenton Building Association*, 11 Bush, —, was based, and counsel say it can be sustained upon the grounds of the opinion in *Rowland, Smith & Co. v. Bell's Ex'or*, 5 B. M., —. That can not be correct, because in those cases the question was whether more interest had been charged than was authorized by the law, while in the Gordon case there was no question as to what interest was authorized to be charged, but the question was whether the legislature could authorize the association to charge more interest than others were permitted to charge. In the two cases cited the constitutional question did not and could not arise. The Gordon case is exactly in point, and must be overruled if the opinion of the court affirming this case is to stand as law. In the Gordon case there was a general law fixing a rate of interest, and the legislature undertook to exempt the association from the operation of the general law and to authorize it to charge a greater rate of interest than any one else was allowed to charge. In this case there is a general law forbidding any one, under a severe penalty, to set up or run a lottery, and the act relied upon undertakes to exempt appellee from the operation of this general law, and thus confer on him a right enjoyed by no other citizen. In every essential particular the two cases are analogous. The Gordon case is expressly based upon this provision of the Bill of Rights. It is there said: "When they (the courts) can see that the grantee of an exclusive privilege has come under no obligation whatever to serve the public in any matter in any way connected with the enjoyment of the grant, it is their duty to pronounce the grant void, as contravening that portion

of the Bill of Rights which prohibits the granting of exclusive privileges, except in consideration of public services."

It is insisted that this legislation is not more within the constitutional inhibition than exclusive grants for ferries, bridges and turnpikes, and it is sought to justify it upon the same principle. That kind of legislation does not sanction this. It is essentially different in principle. The granting of ferry privileges, the authority to build bridges, and to make turnpikes is the exercise of a governmental function, and usually requires the exercise of the power of eminent domain, and are granted in consideration of certain services to be performed for the benefit of the public. Such means of inter-communication is necessary, in order that the citizen may perform his duty to the government, to facilitate commerce and social relations. The existence of this necessity and the existence of the fact that ordinarily these things can not be done without the exercise of the right of eminent domain, renders it the duty of the government to make the grant, and in doing so it may attach such conditions to the grant as it may deem proper, but in all such cases there is a public service or duty to be performed by the grantee. He furnishes the facilities for communication which existing necessity made it the duty of the government to do, and is to that extent acting for the government.

It is upon the same idea of the exercise of a governmental function, and the performance of a service to the public, that all the lottery grants in this State have been sustained. In every instance where such grants have passed under review in the courts, and have been approved, they have been created for the ostensible purpose of establishing schools, libraries, or wharves for the public convenience. All these things, when carried out, are public services, and result in the performance of rights and duties which devolve upon the government. The furnishing of educational facilities, as furnishing means of communication, by which the citizen may perform his duties to the State, is the exercise of governmental functions and duties which may properly be delegated to any person or persons to be performed for the government, and upon such conditions as the government may prescribe. It is upon this principle that the grant to the Green & Barren River Co., in *Smallhouse v. Reynolds*, 8 Bush, —, was sustained. The com-

pany performed a public service by keeping the public works on the rivers in repair, and thus furnishing that facility for commerce which it was the right and the duty of the State to do.

Upon a different principle also rests legislation in regard to the sale of the estates of infants and others under legal disability. It is upon the theory that the State is the guardian of such persons, and of necessity must think and act for them for their protection, either immediately by act of the legislature or mediately through the courts, by legislative authority conferred upon the courts. In this State the legislature, by section 32 of article 2 of the Constitution, is expressly forbidden to do these things by direct legislation, but is required to do them through the courts under general laws to be passed for that purpose.

It is further suggested in the opinion that an act of the legislature authorizing suit to be brought by an individual against the State is the granting of an exclusive privilege. Article 8 section 6 of the Constitution, provides that "the general assembly may direct by law in what manner and in what courts suits may be brought against the Commonwealth." But for this provision of the Constitution such a grant, in my opinion, would clearly be the creation of an exclusive privilege, which is forbidden by the first section of the Bill of Rights. The effect, however, is to allow the legislature to confer the privilege of suing, and as there is no limit prescribed, and no restriction placed upon the legislature as to the character of law that may be passed under this provision, it is reasonable to presume that it should be left to the legislative department in each case to determine whether the right of action should be granted. There is nothing in the Constitution from which it could be determined that it was the intention to confine the legislative action to the passage of a general law authorizing suits against the Commonwealth, because if such had been the intention it was only necessary to say that any citizen might sue the Commonwealth, and no action of the legislature would have been necessary. It was evidently intended to leave the question within the discretion of the legislature.

The theory of all free governments, whether under a written Constitution or not, is equal rights, equal privileges, and equal

capacities to every citizen in the acquisition of property, and in the preservation of life, liberty and property. This legislation violates that spirit as well as the very letter of the Constitution, and the construction contended for by appellee, when carried to its logical and legitimate result, would cause incalculable harm. For illustration, there is a general law against gaming. Suppose the legislature should attempt to pass a law allowing appellee to deal faro, to gamble at cards, or in any other way, and at any place in the State of Kentucky, when all other persons are forbidden by the general law to do these things; or suppose the attempt was made to authorize him to run a lottery for his private gain in every town and village in the State, while the general law forbids any one else to do the same thing? Is it not perfectly clear that the courts would not hesitate to declare such legislation invalid? And yet the same reason that would support the act in favor of appellee would support such legislation. The question presented is not one as to the extent of the inquiry by legislation, but it is an inquiry as to legislative power; not of degree, but of kind.

If this section of the Constitution does not apply to this class of legislation, there is nothing in the letter of the Constitution to prevent the legislature from creating any character of monopoly for the aggrandisement of a private individual. Suppose a general law should be passed forbidding the sale in the State of any given commodity, and an act should be subsequently passed authorizing a particular person, for his personal good, to trade in this commodity. Such a grant would certainly be void, and, I think, under the express letter of the Constitution; but if not void for that reason, it would be void because an arbitrary and tyrannical act not within the scope of legislative authority.

It is not true that the courts can not declare an act of the legislature unconstitutional or void unless expressly forbidden by the letter of the Constitution. The Constitution divides the government into three departments, legislative, executive and judicial, and provides that neither of these departments shall exercise any power belonging to either of the others. The Constitution does not undertake to define what the powers or

duties of these several departments are, but leaves them to be determined by the maxims of Magna Charta and the common law; so that whatever act of the legislative department (which we are alone considering) that is not so approved is outside of the pale of legislation, and absolutely void. For instance, the legislature can not authorize the property of one individual to be taken and transferred to another, it can not make one an arbiter in his own case, nor can it, under the guise of taxation, confiscate the property of the citizen. Not because any of these things are expressly forbidden in the Constitution, but because it is outside of the delegated authority, which is only legislative, and they are, therefore, arbitrary and despotic, belonging to no department of any free government. It appears to me that the act relied upon is likewise outside the limits of legislation, and for that reason void. There is no special obligation of the State to look to the personal welfare of appellee more than to that of any other citizen. He performs no public service, he exercises no delegated governmental function, nor is he a ward of the State by reason of legal incapacity, nor is there anything to indicate that appellee is a charge upon the State by reason of physical disability.

It is insisted that the Commonwealth can not question its own grant of a franchise; that it is necessary in every instance that some individual complain of an injury to himself before the courts can entertain jurisdiction to inquire into the constitutionality of an act of the legislature. This assumption is the result of the failure to recognize that the legislative branch of the government, like the executive and the judiciary, is limited in its operation, and that any act passed outside of this limit is not legislation, but is absolutely a void act as declared by the last section of the Bill of Rights. The legislature is not the State, and its act is not the act of the State, except when done within the bounds prescribed by the Constitution. A void act confers neither power nor immunity upon any one. It is as if it had not been passed. In this case appellee must be held to have known the law, and, therefore, that the act under which he attempted to justify was void. The appearance of the Commonwealth in court is not the appearance of the legislative branch alone, but it, as the representative of the people, and when the whole body of the people

are affected, the Commonwealth, through its constituted legal representative, may appear to question any act of any branch of the government. In England even the attorney-general, in the name of the crown, may appear in court as the representative of the king to question the validity of a patent granted by the king himself, because the whole body of the people are interested that no illegal grant shall exist.

The judgment of the court below should be reversed.

P. W. Hardin for appellant.

I. & J. Caldwell & Winston and B. F. Camp for appellee.

Note by Reporter—The judgment of the lower court being affirmed by an equal division of the court, the foregoing decision of the Court of Appeals will be res adjudicata in this case, and as to the right of Whipps under his grant; but it will not be authority as to any other similar grant.

TRACY, &c. v. ELIZABETHTOWN, LEXINGTON & BIG SANDY R. R. CO.

(Filed May 16, 1882.)

1. In proceedings to condemn real estate for railroad purposes, under the charter of the E., L. & B. S. R. R. Co., the verdict of the jury summoned by the sheriff under the warrant of the justice "shall be confirmed by the circuit court at its next regular term, if no sufficient reason is shown by either party for setting it aside."

The circuit court may proceed to try the case during the same term at which the verdict is filed by giving reasonable time for preparation.

2. In such case notice of the proceedings should be given to the owner unless he is a nonresident.

3. The application to the justice for the warrant to hold the inquest should allege, or it should be shown, that the property sought to be condemned was necessary for a public use.

The burden is on the company to establish its right to have the property condemned by showing that it was necessary for the public use.

4. The legislature is not beyond the control of the courts in exercising the power of eminent domain, either as to the nature of the use or the necessity for the use of any particular property.

5. The legislature can not authorize the taking of private property against the will of the owner, notwithstanding compensation may be required, where the use is not public or no necessity for the taking exists.

The existence of the public use, in any class of cases, is a question to be determined by the courts.

Necessity and a public use must, in all cases, exist as a condition precedent to the legal right to enforce the remedy given to condemn, and the company is not the judge of the existence of the necessity or of the character of the use; both belong to the courts.

6. If the company failed to show the necessity, or the public nature of the use, according to the rule herein laid down, the circuit court should have refused to confirm the verdict in this case.

"It is no longer an open question that railroads do belong to that class of uses considered public."

7. The company has the right to enter so soon as the verdict of the jury is returned and the compensation is paid to the owners, or deposited with the sheriff.

8. If the company undertakes to enter or take possession of property which it had caused to be condemned, that was neither necessary nor for a public use, the owner can prevent the entry by injunction.

9. The supersedeas in this case was improperly issued and ought to have been discharged, as the remedy of the appellant was otherwise complete.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Hargis.

The thirteenth section of an act incorporating the Elizabethtown, Lexington & Big Sandy Railroad Co. (1st volume Session Acts, 1869) provides: "that the president and directors, or a majority of them, or their authorized agents, may agree with the owners of any land, earth, stone, timber, or other materials or improvements, which may be wanted for the construction or repair of said road or any of their works, for the purchase in fee simple or the use and occupation of the same; and if they can not agree, or if the power or owners, or any of them, be a feme covert, under age, non compos mentis, or out of the county in which the property may lie, application may be made to a justice of the peace of said county, who shall thereupon issue his warrant, directed to the sheriff or any constable of the county, requiring him to summon a jury to meet on the land or near the property or materials to be valued, for the purpose of fixing the damages which the owner or owners will sustain by the use and occupation of the property required by said company."

The company, by petition, made application to a justice of the peace for a warrant, as prescribed by that section, alleging that it had been unable to agree with the owners of the land, on which it appears a livery stable is situated, as to the amount of damages which he would sustain by the condemnation thereof, and that "it desired to obtain the title and use in perpetuity" of said land, which is particularly described in the petition.

Without notice or hearing, other than was afforded by an inspection of the petition, the justice issued his warrant, directed to the sheriff, requiring him to summon a jury and proceed with the inquisition, as provided by said section.

The sheriff notified the legal title holders residing in the county, and the occupant of the land and stable, of his intention to hold the inquest, and of the time, place and purpose of it.

The appellant, Tracy, who is the vendee in possession of the land under verbal contract, appeared and filed an answer with the sheriff, before the jury was sworn, in which he denied "that the land and property sought to be condemned by the proceedings herein is necessary for said company in the construction or repair of said road, or for their necessary works or buildings," and controverted the right of the company to take or condemn his property. The issue presented by the answer was not considered by the inquest, the verdict of the jury being confined to the question of compensation alone.

The sheriff returned the verdict to the circuit clerk of the county, who received and filed it, during a regular term of the circuit court, on a subsequent day of which the verdict was confirmed.

From that judgment this appeal is prosecuted.

During a former term of this court appellee's motion to quash the supersedeas and dismiss the appeal was overruled. (78 Ky., 809.)

The appellants insist that the proceedings were erroneous:

1st. Because the inquest was filed and heard during a regular term of the circuit court.

2d. Because F. H. Brown, a nonresident owner of an interest in the property, was not notified of any of the proceedings.

3d. Because the necessity for the taking of their property for a public purpose was not shown by the appellees.

We will dispose of these questions in the order stated.

1st. Appellants rely upon a clause in the 18th section of appellee's charter as forbidding the hearing at the same term which the verdict was returned.

After specifying by whom the verdict shall be signed, re-

turned and filed, that clause provides that "such verdict shall be confirmed by the circuit court at its next regular term, if no sufficient reason is shown by either party for setting it aside."

This does not require the term to be commenced and the trial had after the verdict shall have been filed.

It secures to the property owner the right to a hearing after the return of the verdict, and during a regular term of the court, and it does not matter when the term may have begun, provided a reasonable opportunity for preparation be given the parties.

The appellants were given four days to prepare for trial after the verdict was filed, and the number of witnesses examined, who appear to know all about the property and its nearness to the court, show that a sufficient opportunity to be heard was accorded to both parties.

2d. Notice to the owners is not expressly required by the charter to be given in any stage of the proceedings, but we think the charter, by necessary implication, renders notice indispensable.

It gives the right to an appeal, and unless notice of the proceedings is required and a hearing given such right would be of little value.

There is also a provision in the charter authorizing an agreement for compensation to be made by the company with the owner before the application for the writ of *ad quod damnum*, and certain notice to the owner is contemplated by this provision, as an agreement could not, without notice, be made with him.

And as it does not confine the jury to a view of the property alone in fixing the damages, evidence may, therefore, be given on the question of just compensation, and notice to afford an opportunity to adduce the evidence is essential.

These provisions, when coupled with the restriction that the property must be necessary, as hereafter shown, to the use by the company in discharge of a public duty, indicate an intention upon the part of the legislature to require notice to the owners of the proceedings.

It is true that this court, in the case of *Harper v. The L. & O. R. R. Co.*, 2 Dana, 227, held that it was not indispensable-

that the notice to the owner of the land should be by personal service, but it is said in that case the law did not require such notice, yet "there is much propriety in giving it."

Of course, if the appellee's charter did not expressly or by necessary implication require notice, none, according to that case, would have to be given.

In the case of *Cowan v. Glover, &c.*, 3 A. K. M., 357, notice was not dispensed with except as to nonresidents of the county, and such, we think, is the purport of the appellee's charter.

And as to F. H. Brown, who is a nonresident of the State, no notice was necessary, because nonresidency of the owner is one of the grounds on which an application for the writ might be made, and the impracticability of giving notice to such an owner would greatly retard, if not entirely defeat, the completion of the road.

And in this particular case the necessity for giving him notice is greatly limited by the fact that the occupant and claimant of the land and the resident legal title holders are all before the court upon sufficient notice.

3d. It does not appear from the record that the question whether the property sought to be condemned was necessary for a public use, was considered or disposed of in any stage of the proceedings, either at the inquisition or before the circuit court, except to the extent of rejecting or disregarding the answer of the appellants, which presented an issue upon that question.

No evidence was offered by either party relative to the character of the use or the necessity of the taking, and as the burden is on the company to establish its right to have the property condemned, the pleadings, in the absence of evidence, must determine the question.

The application of the company to the justice of the peace does not disclose its purpose in seeking the condemnation of the property further than its desire to obtain the title and use thereof in perpetuity.

What kind of use or whether any necessity exists for the taking of this property does not appear by the petition or application or in any part of the proceedings. The petition of

the company is, therefore, defective. But the answer of the appellants cured the defect in the petition by alleging that it was not necessary to the public use that their property should be taken, thus supplying the defective petition with the necessary averments that had been omitted, and at the same time denying their truth.

A complete issue was thus made by the answer, and the burden was on the appellee, under the pleadings, to show the existence of the essential prerequisites to its right to take the property.

It is erroneous to suppose that the legislature is beyond the control of the courts in exercising the power of eminent domain, either as to the nature of the use or the necessity for the use of any particular property.

For if the use be not public or no necessity for the taking exists, the legislature can not authorize the taking of private property against the will of the owner, notwithstanding compensation may be required.

The courts can not control or supervise the propriety or policy of the condemnation authorized by the legislature, but this uncontrolled power does not authorize the legislature to "so determine that the use is public as to make the determination conclusive upon the courts. * * The existence of the public use in any class of cases is a question to be determined by the courts." (Mills on Eminent Domain, section 10, and authorities there cited.)

And it is clear, from authority, that even where it is conceded that the use is public the necessity and extent of the exercise of the power of eminent domain belongs to the legislature, subject to two conditions: First, that just compensation shall be made; and, second, that the property desired to be condemned will conduce, to some extent, to the accomplishment of the public object to which it is to be devoted.

With the degree of necessity or the extent to which the property will advance the public purpose the courts have nothing to do; that belongs to the legislature as a political question, and it is not judicial, except so far as the legislature may make it so, by clothing its agents with judicial power and investing the mode of procedure to condemn, with the sub-

stance and forms of judicial process, which is often done, as in the charter before us, by the legislature.

The doctrine established in New York is that the courts are to determine the necessity and the owner may contest that question as well as whether the use is public. The limit there to the grant of the power of eminent domain is that the property sought to be acquired must be for purposes of the corporation, and reasonably necessary to it in the discharge of its duty to the public, and we think such should be the rule where the legislature submits the determination of the necessity to the courts or other agencies.

Where, however, the legislature acts primarily, and authorizes the condemnation and selects the particular property to be condemned, the degree of necessity is wholly with the legislature, if any necessity exists at all, and the purpose be a public one.

Necessity and a public use must, in all cases, exist as a condition precedent to the legal right to enforce the remedy given to condemn, and the company is not the judge of the existence of the necessity or of the character of the use, both belong to the courts. Under the charter before us the circuit court is required to hear the parties, and if any sufficient reason be shown by either of them for setting aside the verdict, it is the duty of the court to refuse to confirm it.

The circuit court having jurisdiction, therefore, to determine what is a sufficient reason, which necessarily means a legal reason for setting aside the verdict, ought to have disposed of the issue presented by the pleadings.

That issue was simply that the use to which the property was sought to be applied was not public, and there was no necessity for taking the property even if the use were public. The affirmative of both propositions was held by the appellee, and it, therefore, became its duty, the conditions precedent to its right to take the property being denied, to show that the object was public, and there was a necessity for the appropriation of the property to it. These things being affirmatively shown, the legal sufficiency of the verdict was the only matter which remained for the court's consideration.

The mere fact that the appellee alleged that it desired the

property was insufficient to show that there was a necessity for taking it or that the purpose was public, as the word "wanted" as used in the charter is not synonymous with desired, but it was used by the legislature in the sense of necessary, as shown by the ordinary and common sense reading of the section quoted, by its use in the 12th and 14th sections of the charter, and by the substitution for it of the word required in the 13th section, which directs that the damages for "the use and occupation of the property required by said company must be assessed under oath."

The company is restricted to the taking of such, and so much property as is reasonably necessary to the construction or repair of its road or works, and in order to prevent it from becoming its own judge the issue presented by the appellants should have been heard and determined by the circuit court, and if the company had failed to show the necessity or the public nature of the use according to the rule herein laid down, the court should have refused to confirm the verdict.

It is not necessary to elaborate the consequences which would flow from the doctrine that a corporation or the legislature could conclusively determine, whether right or wrong, either of these questions; or to expose the inefficiency of the constitutional guarantee of the right to private property by citing instances where it might be taken, if such were the law, for private use. It is sufficient to say that the legislature did not in this charter assert the right or delegate the power to the company to determine these questions, but left them with a competent tribunal, before which all parties are entitled to be heard.

It is proper to say, as this case must go back for a new trial, that it is no longer an open question that railroads do belong to that class of uses considered public, and any property which is reasonably necessary to the appellee in the construction or repair of its road or works may be lawfully appropriated under its charter.

As the appellee had the right, by express provision of its charter, "to proceed to construct their said road as soon as the first verdict of the jury shall be returned, whether the same be set aside and a new jury ordered or not," it was suggested to our minds, and we expressed our apprehension in a

former opinion herein, that great danger and irreparable injury might result from the entry of the company and destruction of the property, but we are satisfied that the clause of the charter quoted authorizes the company to enter so soon as the first verdict may be returned and the compensation paid to the owners, or deposited with the sheriff under the control of the court, for the authority in support of this position is too well established to be overturned in the cases of *Jackson v. Minn.*, 4 *Littell*, 323; *Duncan v. Mayor of Louisville*, 8 *Bush*, 105; *Gashweller v. McIlvay*, 1 *Mars.*, 8.

And should the company undertake to enter and take possession of property which it had caused to be condemned, but that was neither necessary to nor for a public use, the owner could prevent the entry by injunction, and thus protect himself from an unlawful taking or application of his property, and we are, therefore, of the opinion, after mature deliberation, that the supersedeas which we refused to discharge on the motion of the appellee was improperly issued, and ought to have been discharged, as the remedy of the appellants was otherwise complete, and would afford them ample protection against an entry before confirmation or the setting aside of the verdict.

Wherefore, the judgment is reversed and cause remanded, with directions to grant appellants a new trial upon principles not inconsistent with this opinion.

D. G. Falconer, Huston & Mulligan and Wm. Lindsay for appellants.

Breckinridge & Shelby for appellee.

ABSTRACTS OF DECISIONS NOT TO BE REPORTED.

NORTON v. MOUNT SAVAGE FURNACE CO., &c.

Filed May 11, 1882.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Hines, affirming.

For reasons assigned in the case of *Miller v. McCrory, White & Co.*, ante.. 784, the judgment of the court below is affirmed.

B. Bacon for appellant.

R. H. Blain and Barret & Brown for appellees.

BALDWIN & CO. v. FIRST NATIONAL BANK OF RIPLEY, O., &c.

Filed May 12, 1882.

Appeal from Fleming Circuit Court.

Opinion of the court by Judge Hines, affirming.

Where two purchasers of the same property are equally innocent, and the vendor is insolvent, the second purchaser will be protected where he has obtained possession of the property under his purchase, without notice of the prior claim, and the first purchaser, by leaving the possession with the vendor, has enabled him to perpetrate a fraud by making a second sale.

Thos. L. Given for appellants.

W. S. Botts, J. P. Harbeson and W. H. Cord for appellees.

LONGSHAW v. LINNING & JACKSON.

Filed May 11, 1882.

Appeal from Caldwell Circuit Court.

Judge Hines delivered response of court to petition for rehearing.

In affirming on motion as a delay case the court acts and decides upon an inspection of the record, and not upon the statement of counsel for the appellant.

L. Pepper for appellant.

H. Burnett for appellees.

HODGE v. COMMONWEALTH.

Filed May 23, 1882.

Appeal from Crittenden Circuit Court.

Opinion of the court by Judge Hargis, affirming.

1. Indictment under local option law in Marion District, No. 1, of Crittenden county, was sufficient in this case.

2. It is not necessary to allege that the local option law was not repealed, under which the indictment was found in this case.

Wm. Lindsay for appellant.

P. W. Hardin for appellee.

MENZIES v. FARMERS BANK OF KENTUCKY.

Filed May 13, 1882.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Pryor, affirming.

1. The endorsement upon a bill "Pay A or order on account of B," does not invest A with title to the bill, but operates as a notice that A holds the bill in trust for B, and that neither A nor his endorsers have any interest in it.

2. Presumption as to residence of drawer or endorser of a bill of exchange—Notice—If at the time the bill or note is drawn or endorsed the party resides at a certain place, the holder may presume that he resides there at its maturity, and send notice accordingly, unless he has received information that the drawer or endorser has changed his residence.

3. Where the endorser is in the habit of receiving mail at two or three postoffices, notice sent to either is sufficient.

General direction by endorser that notices should be sent to a particular postoffice will not be restricted by the intention of the endorser that the

direction should apply only to paper on which he was primarily liable, unless he can show that the direction was understood in the restricted sense.

4. Innocent holder of a bill of exchange can not be affected by a parol agreement between the parties thereto, of which agreement said holder had no knowledge.

Stevenson & O'Hara for appellant.

McKee & Finnell for appellee.

BERGMEYER v. COMMONWEALTH.

Filed May 25, 1882.

Appeal from Greenup Circuit Court.

Opinion of the court by Judge Hargis, affirming.

Under the local option law of Greenup county (volume 2, Acts 1878, page 648) the sale or disposal by bargain, of either spirituous, vinous or malt liquors, in quantities less than one-half gallon, is punishable by the same penalty as in cases of keeping a tipling house under the General Statutes, namely, \$60.

Roe & Roe and Wm. Lindsay for appellant.

P. W. Hardin for appellee.

BRIGHT v. COMMONWEALTH.

Filed May 25, 1882.

Appeal from Fleming Circuit Court.

Opinion of the court by Judge Pryor, affirming.

Appeal allowed by an act which does not prescribe the time in which the appeal should be taken is governed by the provisions of the Civil and Criminal Codes.

Appeal from county to circuit court in this case should have been taken in sixty days from the rendition of the judgment.

W. J. Hendrick for appellant.

P. W. Hardin for appellee.

MOORE, &c. v. McDOWELL, &c.

Filed May 25, 1882.

Opinion of the court by Judge Pryor, reversing.

Appeal from Fleming Circuit Court.

2. Election to decide whether or not a new charter should be adopted by the citizens of Flemingsburg was properly held by the town clerk, instead of by the clerk of the regular county and district election.

The act creating the new charter provides that at the first regular election "the clerk of the election shall open a poll book," etc., to decide whether the charter shall be adopted. Held—That under this provision the election held by the town clerk was valid.

2. In the construction of a section of the charter in this case "it is proper to consider not only the subject-matter of the entire law in order to arrive at the legislative intent, but the charter for which the act in question was intended as a substitute."

J. & J. W. Rodman, M. M. Teagar, W. J. Hendrick and Jas. W. Anderson for appellants.

Andrews & Sudduth, J. P. Harbeson, Wm. Lindsay and A. Duvall for appellees.

THE SUPERIOR COURT BILL.

In the enrolled copy of the Superior Court Bill there is an error.

Section 13 reads as follows: "Sections 1, 2, 3, 4, 5, 9, 11 and 12 of article 11, chapter 28 of the General Statutes of Kentucky, shall be applicable to the Superior Court."

In enrolling the original bill the word "eleven" was substituted for II (two).

What effect this mistake may have is a question much easier to ask than to answer? It may be a serious matter, if the ingenuity of the lawyers and courts can not find some proper mode of avoiding any trouble or annoyance on account of it.

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